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THE convention, recently held at Minneapolis, for the purpose of drafting a national bankruptcy law, seems to have concluded its labors, in a matter satisfactory, at least, to its members, who are unanimous in praise of the bill adopted by the convention and which will be pressed upon congress. We have not, as yet, had an opportunity to study its features, but from all that we can learn it is the embodiment of the wisdom of what is known as the Lowell bill, with some of the harsher features of the latter removed. The jurisdiction of courts of bankruptcy, proposed to be established, is very broad and comprehensive. The effort seems to have been to provide an economic system of distribution of a debtor's estate, and while protecting and securing a creditor as far as possible, to enable an honest debtor to shake off his shackles and start out anew in business life. There will be ample opportunity to learn and discuss the many features of this bill, as congress, if it acts at all upon the subject, will move slowly in its consideration. We do not, in our own mind, feel satisfied that a majority of the people most interested in the question desire the adoption of any bankruptcy measure, and we feel very sure that a large number of them are opposed to such legislation. Whether the wisdom and merit of what is now known as the Torrey bill, in honor of its chief framer, will, upon study and investigation, be so clearly revealed as to dissipate and destroy the antagonism which, in certain quarters, exists towards any measure in that direction, remains to be seen.

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WE trust that current rumor does an injustice to President Harrison, in the report of the names of those, who stand highest in his estimation, with a view to the vacancy existing, and others that must soon occur, upon the supreme bench. Not that the gentlemen most prominently named are not men of good character and respectable acquaintance with the law; but they are not of that pre-eminent ability, which public opinion demands, in the case of one elevated to this important place. No man, whatever his claims of party service or of friendship or of local reputation, should be admitted to this narrow circle, unless he has won a right to it by the clearness and vigor of his legal opinions, and the recommendation of a great and successful experience. Presidents have made mistakes in the past. Mr. Cleveland placed there one man whose comparative inexperience, and mediocre reputation in the law, awakened general disapprobation and whose appointment would probably have lacked confirmation, had it been opposed only on the legitimate ground of unfitness. Taught by this, he filled the office of chief justice in such a way as to win general approval. The example should not be lost upon President Harrison. It is understood, of course, that Republicans will be named, but there is more than one jurist in the ranks of that party whose elevation would be received with universal approval. It ought to be and probably is unnecessary to remind the president that this office is not personal; that it is in the highest sense national, and that every citizen and particularly those of the legal profession have a right to criticise freely.

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THE inability of the officers of the Chicago criminal court, after two weeks' continuous labor, to obtain even one satisfactory juryman in the Cronin murder case, will serve to convince the most conservative, that the law as applied by the judge of that court is radically wrong. We do not question that Judge McConnell is acting upon what he considers to be the law, as governing the selection and qualification of jurymen, and it may be that under the strict application of the old common-law doctrines, in force in Illinois his rulings may be justified and upheld, but it is plainly evident that under the wide latitude permitted in the examination of jurors, and the stricter rulings of the court as to the knowledge and opinion of the facts, not permissible in a juror, there is no hope of obtaining an intelligent panel, or even any, until, at least, the very large number of peremptory challenges have been exhausted. It is all nonsense, in these days, to follow the

old rule that the having formed an opinion necessarily disqualifies a juror in a criminal case. Men are constantly forming what we call opinions, and all sorts of hearsay evidence, which never reaches the dignity of belief. In a technical sense, it might be said, that it would take evidence to remove these ephemeral opinions. But what evidence. The slightest contradiction will do it. They are not steadfast, strong, uncompromising beliefs, but merely passing thoughts that would not weigh, in the slightest degree, against sworn testimony. And yet under the acute questioning of an ingenious attorney, a man may be made to think, that these slight opinions he has formed are cherished beliefs, which would take a mountain of evidence to remove. At the time when the rule was established intelligent jurors could be found, who had formed no opinion in regard to a case, for the reason that they heard or read little about it. That was before the telegraph, and the press, brought to every man's door the news of every event and every crime, with full details of everything connected therewith. The law, upon this subject, has necessarily advanced with the changed circumstances. It has adapted itself to what the common judgment of the people see is essential to the proper administration of the criminal law. To administer and apply the old rule, as it seems to be applied in the Cronin case, will exclude from the jury box every man of average intelligence. The following reported colloquy, though perhaps not fully vouched for as of actual occurrence, might easily be accepted as a fair deduction for common law principles. Lawyer—Have you read the papers? Talesman—No, sir; I can't read. Lawyer—What is your business? Talesman—I hain't got none, sir. Lawyer—Well, how do you make a living? Talesman—I don't make a living, sir. I am an inmate of the asylum for the feeble-minded. Lawyer (to judge)—We will accept this man, your honor. Some American courts have directly disregarded the old rule, and a Maryland court has but recently added its opinion to the increasing weight of authority in that direction forcibly stating the rule to be that "all that can be required of a juror, to render him competent is that he shall be without bias or prejudice for or against the accused, and and that his mind is free to hear and impartially consider the evidence, and to render a verdict thereon without regard to any former opinion or impression existing in his mind, formed upon rumor or newspaper reports."

## NOTES OF RECENT DECISIONS.

A QUESTION of constitutional law and the effect of a limitation upon the indebtedness of a county came before the Supreme Court of the United States in Lake County v. Rolling. It was there laid down that, under Const. Colo., art. 11, § 6, limiting the amount to which a county can become indebted by loan, and providing further, that "the aggregate amount of indebtedness of any county for all purposes * * * * shall not exceed, at any time, a certain limit therein fixed, a county cannot exceed such limit for loans or for any other kind of indebtedness, even on warrants issued for fees of witnesses, jurors, sheriffs and the like, as required by statute. Lamar, J., says:

We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain, and in such case there is a well settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and, when the text of a constitution provision is not ambiguous, the courts, in giving construction thereto are not at liberty to search for its meaning beyond the instrument. To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. Newell v. People, 7 N. Y. 97; Hills v. Chicago, 60 Ill. 86; Denn v. Reid, 10 Pet. 524; Leonard v. Wiseman, 31 Md. 204; People v. Potter, 47 N. Y. 375; Cooley, Const. Lim. 57; 1 Story, Const. § 400; Beardstown v. Virginia, 76 Ill. 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. U. S. v. Fisher, 2 Cranch, 358, 399; Doggett v. Railroad Co., 99 U. S. 72. There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a delib-

erative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a State, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption. Such considerations give weight to that line of remark of which People v. Purdy, 2 Hill, 35, affords an example. There, Bronson, J., commenting upon the danger of departing from the import and meaning of the language used to express the intent, and hunting after probable meanings not clearly embraced in that language, says: "In this way the constitution is made to mean one thing by one man, and something else by another, until in the end it is in danger of being rendered a mere dead letter; and that, too, where the language is so plain and explicit that it is impossible to mean more than one thing, unless we lose sight of the instrument itself, and roam at large in the fields of speculation." Words are the common signs that mankind make use of to declare their intention to one another; and, when the words of a man express his meaning plainly, distinctly, and perfectly, we have no occasion to have recourse to any other means of interpretation. Defendant in error insists that the interpretation contended for by the county leads to certain absurd consequences—viz., that it is senseless to limit the power of a county to incur debt generally, since its exercise of such a power may, by sudden exigencies, become imperatively necessary to the discharge of its functions; that it would be to require the county to provide in advance, by taxation or otherwise, for the payment of expenses, which from their nature, can only be guessed at; that it would be to enable any county in two years, by a vote and a loan, to exhaust the whole possible indebtedness in the way of buildings, roads, and bridges, leaving no margin for other necessities; that it would be to destroy the county governments, since the county officials and others will not work for nothing, and the margin of possible debt is, in nearly all the counties, already reached; and that it would be to avoid nearly all the tax payments heretofore made in warrants. All of these objections could well be answered from the facts as disclosed by the bill of exceptions, but it is not necessary. We cannot say, as a matter of law, that it was absurd for the framers of the constitution for this new State to plan for the establishment of its financial system on a basis that should closely approximate the basis of cash. It was a scheme favored by some of the ablest of the earlier American statesmen. Nor can the fact disclosed in the bill of exceptions that after the adoption of the State constitution the county officials, and many of the people, designedly or undesignedly, disregarded the constitutional rule, render the plan absurd. If it was a mistaken scheme, if its operation has proved, or shall prove, to be more inconvenient than beneficial, the remedy is with the people, not with the courts. In Railroad Co. v. Taylor Co., 52 Wis. 37, 8 N. W. Rep. 833, the court says: "We have been urged with great ability to give the section such construction as to forever prevent unjust discrimination by the legislature, and grave consequences have been assumed as the result of a different construction. On the other hand we have been urged with equal ability that such a decision would unseat many titles, stop revenue, necessitate an immediate revision of the laws of taxation, and possibly the calling of a constitutional convention. The answer to all this is obvious. It is no part of the duty of the court to make or unmake, but simply to construe, this provision of the constitution. All questions of policy; all questions of restriction and unjust discrimination; all questions of flexibility and adjustability to meet the varied wants and necessities of the people—must be regarded as having been fully considered and conclusively determined by the adoption of the constitution. The oath of all is to support it as it is, and not as it might have been. To do so may, in some cases, lead to individual hardships; but to do otherwise would be most portentous of evil." In Law v. People, 87 Ill. 396, the court said: "But, should it work hardship to individuals, that by no means warrants the violation of a plain and emphatic provision of the constitution. The liberty of the citizen, and his security in all his rights, in a large degree depend upon a rigid adherence to the provisions of the constitution and the laws, and their faithful performance. If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizen is imperiled. Then the will, it may be the unbridled will, of the judge, would usurp the place of the constitution and the laws, and the violation of one provision is liable to speedily become a precedent for another, perhaps more flagrant, until all constitutional and legal barriers are destroyed, and none are secure in their rights. Nor are we justified in resorting to strained construction or astute interpretation, to avoid the intention of the framers of the constitution, or the statutes adopted under it, even to relieve against individual or local hardships. If unwise or hard in their operation, the power that adopted can repeal or amend, and remove the inconvenience. The power to do so has been wisely withheld from the courts, their functions only being to enforce the laws as they find them enacted." In the light of these principles, expressed in the authorities quoted, and in many others, we must decline to read the expression in section 6, "and the aggregate amount of indebtedness of any county, for all purposes," etc., as if it were written "and the aggregate amount of such indebtedness," etc.

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AN important question of corporations and *ultra vires* was involved in the decision of Wright v. Hughes, by the Supreme Court of Indiana. There it was declared that where a corporation has power to borrow money and execute mortgages to secure it, the facts that it borrows money to be used in an act which is *ultra vires*, and that the lender knows of the purpose for which the money is to be used, not, however, being in complicity therewith, are no defense to the enforcement of a mortgage given to secure payment of the loan, and that if the act of borrowing the money were *ultra vires*, neither the corporation nor its stockholders, suing in its stead, can procure the mortgage to be set aside, without offering to return the money borrowed. The court says:

The proposition advanced, that a corporation cannot,

without the consent of the shareholders, abandon the fundamental purpose for which it was organized, and engage in transactions or embark its capital in enterprises other than those which come legitimately within the scope of its charter, is abundantly maintained. Green's Brice Ultra Vires, 77. Accordingly, it is the established rule, that a stockholder or other person interested, who has not consented, may invoke the aid of a court of chancery to restrain the managing directory from engaging or continuing in an enterprise which involves a material change in the original purposes or powers of the corporation, and which is not in aid of its primary object. Board v. Railroad Co., 50 Ind. 85; McCray v. Railroad Company, 9 Ind. 358; Bradley v. Ballard, 55 Ill. 413; 1 Mor. Priv. Corp. §§ 273, 274. This rule is neither technical nor arbitrary, but has for its foundation the means of affording protection to stockholders, who resort to it in good faith for the purpose of holding the corporation to the prosecution of its legitimate and proper business. Holt v. Bank, 25 Fed. Rep. 812. The appellants, it may be well to remark, are not in a court of equity asking that the corporation in which they are interested as members and policy holders be restrained from embarking in an enterprise foreign to its original purpose, or from winding up the corporate business. These are all matters of the past. The charter of the corporation has been forfeited to the State, and its business is being wound up without objection from the plaintiffs, so far as appears. The only question here is whether the plaintiffs, who in this proceeding occupy the place of the corporation, may now question the power of its directors, who were intrusted with the management of its affairs, to borrow the money and execute the bond and mortgage which they now seek to have canceled and declared of no effect, after the corporation has received into its treasury and used the money, which they were given to secure. The weight of modern authority supports the conclusions that private corporations, organized for pecuniary profit, may, like individuals, borrow money whenever the nature of their business renders it proper or expedient that they should do so, subject only to such express limitations as are imposed by their charters. The power to borrow carries with it, by implication, unless restrained by the charter, the power to secure the loan by mortgage. Accordingly, it may be regarded as settled, when general authority is given a corporation to engage in business, and there are no special restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessories. It may borrow money to attain its legitimate objects, precisely as an individual, and bind itself by any form of obligation not forbidden. Insurance Co. v. Robinson, 25 Ind. 536; Jones v. Guaranty Co., 101 U. S. 622; Reichwald v. Hotel Co., 106 Ill. 439; Booth v. Robinson, 55 Md. 419; Hays v. Coal Co., 29 Ohio St. 330; Railroad Co. v. Dow, 19 Fed. Rep. 388; Green's Brice Ultra Vires, 213 *et seq.*; 1 Mor. Priv. Corp. §§ 342, 343. In the absence of any express or implied limitation upon the power of the Franklin Life Insurance Company to borrow money, it might well be held, for anything that appears in the complaint, that the board of directors, in whom was vested broad and comprehensive powers in respect to the management of the business of the corporation, did not exceed its authority in making the loan for the purpose of buying in outstanding policies, if that seemed the best method to avert financial disaster. However this may be, since there was no statute prohibiting the company from purchasing its outstanding policies, or from borrowing money for that purpose, and the transaction was not intrinsically illegal or immoral, the bond and mortgage given to secure the loan of money to be used in taking up the policies were not void. The plaintiffs, having come into a court of equity to avoid a transaction which, at the most, was only voidable, they must, in order to obtain any standing, offer to do equity. It is not equitable to ask a court of conscience to avoid a mortgage given to secure borrowed money, without offering to return the money which has been received. Having received the full benefit of the contract, it would now be a glaring injustice to allow those representing the corporation to set it aside and retain the benefit, by sustaining their contention that the loan was *ultra vires;* especially as this doctrine only concerns the corporation in its relations with the State and with its stockholders, and is never entertained where it will injure innocent third persons. Bissell v. Railroad Co., 22 N. Y. 258. Where a corporation makes a contract that is in excess of its chartered powers, it may well be that, while the agreement remains wholly executory, it cannot be enforced. So long as the contract is unexecuted, it does not estop the corporation, because the power of a corporation, like that of a person under a legal disability, cannot be enlarged by the mere form of a contract which it had no capacity to make. Ditch Co. v. Zellerbach, 37 Cal. 543. The doctrine of *ultra vires* may be appealed to in such a case to resist the enforcement of a contract. It would be carrying that doctrine to an unwarranted extent, however, to hold that a corporation might obtain the money of another, and, with the fruits of the contract in its treasury, interpose the defense of *ultra vires;* or, having used the money with the consent or acquiescence of its stockholders, ask that the lender be restrained from collecting it back, on the ground that the money was obtained in violation of the charter of the corporation. Like natural persons, corporations must be held to the observance of the recognized principles of common honesty and good faith, and these principles render the doctrine of *ultra vires* unavailing when its application would accomplish an unjust end, or result in the perpetration of a legal fraud. After a corporation has received the fruits which grow out of the performance of an act *ultra vires*, and the mischief has all been accomplished, it comes with an ill grace then to assert its want of power to do the act or make the contract, in order to escape the performance of an obligation it has assumed. The most that can be said in the present case is that there was a defect of power to engage in the transaction in which the money borrowed was used. The power to borrow money was plenary, and subject to no restrictions. In such a case, although the lender may know that it is the purpose of the borrower to use the money in an irregular way, yet, if the contract between the lender and borrower is not in violation of law, or declared void by statute, the money may be recovered, unless the lender was in some way implicated in furthering the borrower's design, or accessory to the prohibited or illegal act. Sondhein v. Gilbert, 116 Ind.—, 18 N. E. Rep. 687; Cummings v. Henry, 10 Ind. 109; Bickel v. Sheets, 24 Ind. 1. Wharton states the rule thus: "It is not enough that the party lending might have foreseen that the money would have been likely to have gone to an illegal object, or that the person borrowing was engaged in illegal enterprises. Nor will it be enough that there was an intention that the party borrowing should illegally appropriate the loan. He must know that the borrower is purposing the specific illegal use, and must be implicated as a confederate in the transaction." 1 Whart.

Cont. §§ 341-343; Thompson v. Lambert, 44 Iowa, 239. The conclusion which follows is that, even if it were conceded that the money was borrowed to be used in a transaction altogether beyond the power of the corporation, and that the lender knew the purpose for which it was to be used, since there is no statutory prohibition involved, and the lender was in no way in complicity with the borrower in carrying out the transaction in which the money was used, there exists no impediment against the enforcement of the contract. As there was, at the utmost, merely a defect of power in the corporation to engage in the transaction in which the money was used, and no restriction whatever upon its power to make the loan and execute the securities here in question, neither the corporation nor the plaintiffs, who occupy its place, will be heard to assert that the transaction in which the money was borrowed was *ultra vires*. If, however, it were conceded that the borrowing of the money was a transaction beyond the chartered power of the corporation, the authorities fully justify the conclusion that it would not be heard to assert the invalidity of the transaction while it retained its fruits. The rule is now too thoroughly established to be longer open to question that, where a contract has been executed and fully performed on the part of the corporation, or of the party with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation. Board v. Railway Co., 47 Ind. 407; Railroad Co. v. Flanagan, 113 Ind. 488, 14 N. E. Rep. 370; Railway Co. v. Derkes, 103 Ind. 520, 3 N. E. Rep. 239; Pancoast v. Insurance Co., 79 Ind 172; Hitchcock v. Galveston, 96 U. S. 340; Railway Co. v. McCarthy, *Id.* 258; Bradley v. Ballard, *supra;* Railroad Co. v. Dow, *supra;* Arms Co. v. Barlow, 63 N. Y. 62. "Corporations, like natural persons, have power and capacity to do wrong. They may, in their dealings and contracts, break over the restrains imposed upon them by their charters; and, when they do so, their exemption from liability cannot be claimed on the mere ground that they have no attributes or faculties which render it possible for them thus to act." Bissell v. Railroad Co., *supra.* The law never sustains the defense of *ultra vires* out of regard for the corporation. It does so only where the most persuasive considerations of public policy are involved. Wright v. Line Co., 101 Pa. St. 204; Railroad Co. v. Transportation Co., 83 Pa. St. 160; Plankroad Co. v. Murray, 15 Ill. 336.

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THE distinction between an assignment of a lease and a subletting of the premises by a lessee is well drawn by the Supreme Court of Illinois, in Sexton v. Chicago Storage Company. The court says:

The more recent English decisions, and all of the text-books treating of the question which have been accessible to us, hold that, where all of the lessee's estate is transferred, the instrument will operate as an assignment notwithstanding that words of devise instead of assignment are used, and notwithstanding the reservation of a rent to the grantor, and a right of reentry on the non-payment of rent or the non-performance of the other covenants contained in it. 1 Platt, Leases, 1-9, 102; Woodf. Landl. & Ten. (7th ed.) 211; Wood, Landl. & Ten. p. 131, § 93; Tayl. Landl. & Ten. (8th ed.) 16, note 3; Bac. Abr. tit. "Leases," H 3; 2 Prest. Conv. 124, 125; Beardman v. Wilson, L. R. 4 C. P. 57; Doe v. Bateman, 2 Barn. & Ald. 168; Wollaston v. Hakewill, 3 Scott, N. R. 616. Undoubtedly many cases may be found wherein the lessee has granted to another party his entire term, retaining no reversionary interest in himself; and it has been held that the relation, as between the parties, was that of landlord and tenent, or, perhaps more correctly, lessee and sublessee, because such was clearly the intention of the the parties; but this was the result of contract only, and not conclusive upon the original landlord, since he was not a party to it. The relation of landlord and assignee of a term, however, it has been seen, does not result from contract, but from privity of estate, and therefore, when the original lessee has divested himself of his entire term, and thus ceased to be in privity of estate with the original landlord, the person to whom he has transferred that entire term must necessarily be in privity of estate with his original landlord, and hence liable as assignee of the term. See Wood, Landl. & Ten. 132, and authorities cited in note 1; Van Rensselaer v. Hays, 19 N. Y. 68; Pluck v. Digges, 5 Bligh (N. S.), 31; Thorn v. Woolicombe, 3 Barn. & Adol. 586; Carpenters' Union v. Railway Co., 45 Ind. 281; Smiley v. Van Winkle, 6 Cal. 605; Blumenberg v. Myres, 32 Cal. 93; Schilling v. Holmes, 28 Cal. 230. Counsel for appellees contend, and the courts below ruled accordingly, that the reservation of a new and different rent, or the reservation to the lessor of the right to declare the lease void for the non-performance of its covenants, and to re-enter for such breach, or at the end of the term, coupled with the covenant of the lessee to surrender at the end of the term or upon forfeiture of the term for breach of covenant, make the letting by lessee a subletting and not an assignment of the term, notwithstanding the the lessee has retained in himself no part of the term; and they rely upon Collins v. Hasbrouck, 56 N. Y. 157; Ganson v. Tifft, 71 N. Y. 48; McNeil v. Kendall, 128 Mass. 245; and Dunlap v. Boulard, 131 Mass. 161 —as sustaining this contention. There is general language in Collins v. Hasbrouck quite as broad as claimed; but no question therein presented called for its use, and its meaning ought to be limited by the facts to which it was applied. There the first original lease was for the term of ten years from the 1st of April, 1864; the second was for the term of nine years from the 1st of April, 1865. Thus both expired April 1, 1874. The sublease was for the term of two years and seven months from the 1st of September, 1867—that is to say, until the first of April, 1870—with the privilege, however, to the lessee to extend the term four years, or until April 1, 1874, by giving two months' notice, etc. The plaintiff claimed that the leases were forfeited by the subletting, and the court so held. No distinction was taken, in the opinion of the court, between an absolute demise until the end of the term and a mere privilege to have the demise extended four years, which was until the end of the term. We have held that a similar clause in a lease is not a present demise, but a mere covenant, which may be specifically enforced in chancery, or upon which an action at law may be maintained for a breach of covenant. Hunter v. Silvers, 15 Ill. 174; Sutherland v. Goodnow, 108 Ill. 528. And it would seem quite evident that in no view could the reversion have passed until after the grantee elected to have the term for four years longer; and so, when the lease was executed, there was still a reversionary interest in the sublessor of four years, subject, though it may have been, to be thereafter divested by the election of the sublessee. In Ganson v. Tifft, the sublease provided that at the expiration of the term, or other sooner determination of the demise, the lessee should surrender the demised premises to the lessors, and the court said: "This constitutes a sublease of the premises, and not an assignment of the term." In

Stewart v. Railroad Co., 102 N. Y. 601, 8 N. E. Rep. 200, there was a demise by the lessee to the Long Island Railroad Company for a term longer than that held by the lessee. There was also a different rent to be paid than that provided to be paid by the original lease, and there was a reservation of the right to re-enter for non-payment of rent, etc. It was held that, as to the original landlord, this amounted to an assignment of the lease, and that its character was not destroyed by the reservation therein of a new rent to the assignor with a power of re-entering for non-payment of rent, or by its assumption of the character of a sublease. The court, after laying down the rule substantially as we have heretofore stated it to be recognized by the text-books and recent English decisions, said: "The effect, therefore, of a demise by a lessee for a period equal to or exceeding his whole term is to divest him of any reversionary right and render his lessee liable, as assignee, to the original lessor, but at the same time the relation of landlord and tenent is created between the parties to the second demise, if they so intended;" citing Tayl. Landl. & Ten. (7th ed.) § 109, note; *Id.* § 16, note 5; 1 Washb. Real Prop. (4th ed.) 515, note 6; Adams v. Beach, 1 Phila. 99, 178; Carpenters' Union v. Railway Co., 45 Ind. 281; Lee v. Payne, 4 Mich. 106; Lloyd v. Cozens, 2 Ashm. 138; Wood, Land. & Ten. (Bank's ed.) 347—and then adding: "These rules are fully recognized in this State. Prescott v. De Forest, 16 Johns. 159; Bedford v. Terhune, 30 N. Y. 457; Davis v. Morris, 36 N. Y. 569; Woodhull v. Rosenthal, 61 N. Y. 382, 391, 392." In speaking of the ruling in Collins v. Hasbrouck, *supra*, after stating the facts, the court said: "In the opinion, the question is discussed whether the sublease amounted to an assignment of the term of the original lease, or a mere subletting or reletting of part of the demised premises. This question, in view of the result reached on the question of waiver, ceased to be controlling; but, in discussing it, the learned judge delivering the opinion made some remarks touching the effect of reserving a new rent in the sublease, and of reserving to the original lessee a right of re-entry for a breach of condition by his lessee, which have given rise to some confusion. The features of the instrument which are above referred to would be proper subjects of consideration for the purpose of determining whether the relation of landlord and tenant was created as between the original lessee and his lessee, and bore upon the question then before the court, viz., whether the second lease was a subletting or reletting of part of the demised premises, which constituted a breach of the covenant not to sublet or relet. But the question of privity of estate between the original lessor and the lessee of his lessee was not in the case. The determination of the question depends upon whether the whole of the term of the original lessee became vested in his lessee, and the circumstances that the second lease reserves a different rent or a right to entry for breach of condition are immaterial." And, after quoting many authorities to sustain that position, the opinion proceeds: "The cases which hold that where a lessee subleases the demised premises for the whole of his term, but his lessee covenants to surrender to him at the end of the term, the sublease does not operate as an assignment, proceed upon the theory that, by reason of this covenant to surrender, some fragment of the term remains in the original lessor. In most of the cases, and in the earlier cases in which this doctrine was broached, the language of the covenant was that the sublessee would surrender the demised premises, on the last day of the term." It is true that in this case, as has been before stated, the lessee demised for a number of years beyond the term for which he held; but it is impossible that, upon principle, there can be any difference between a demise of an entire term, which can leave no possible space of time remaining in the lessor, and a demise for any additional time beyond the term; for, since no one can demise what he does not have, all that can pass by the demise in the latter instance is the entire term of the lessor.

## BAGGAGE, WHAT IS AND IS NOT.

What constitutes "baggage" within the meaning of that term as commonly used with reference to travelers on railway or other lines of travel? The baggage carried by a traveler is often designated in the books as "personal baggage," and sometimes "luggage."

Chief Justice Cockburn, after alluding to the difficulty of accurately defining "baggage," laid down the following rule or definition: "We hold the true rule to be, that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose of the journey, must be considered as personal baggage. This would include, not only all articles of apparel, whether for use or ornament, but also the gun case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the takings of which have arisen from the fact of his journeying. On the other hand, the term 'ordinary baggage' being thus confined to that which is personal to the passenger and carried for his use or convenience, it follows that what is carried for the purpose of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary baggage, unless accepted as such by the carrier."[1]

The usually accepted definition of baggage as defined by an American court is that given

[1] Macrow v. Great Western R. Co., L. R. 6 Q. B. 622, 3 Alb. L. J. 476, 24 L. T. 618, approved in Gleason v. Goodrich Trans. Co., 32 Wis. 85, 98, 14 Am. Rep. 716. See Woods v. Devin, 17 Ill. 746; Chicago, etc. R. Co. v. Collins, 56 Ill. 212.

in Hawkins v. Hoffman,[2] viz.: "Such things as a traveler usually carries with him for his personal convenience in the journey."[3]

It is useless to multiply definitions; and we will, therefore, first, give those cases where the articles named have been held to be "baggage," and, second, where articles have been held not to be "baggage." But we must notice that under Chief Justice Cockburn's definition several things must be observed before it can be said that the particular personal property is or is not "baggage." First. The property must be for the personal use or convenience of the passenger, and not for the personal use of another. Second. In ascertaining the necessity of such "personal use or convenience" we must take into consideration the habits or wants of the passenger. Third. In ascertaining the habits or wants of the passenger, the particular "class to which he belongs" must be considered. Fourth. The passenger's personal use or convenience according to the habits or wants of the class to which he belongs, must be considered "with reference to the immediate necessities, or to the ultimate purpose of the journey."[4]

*In what Instance Personal Property has been held to be "Baggage."*—Money.—Money *bona fidely* taken in a trunk for traveling expenses and personal use, to such a reasonable amount as a prudent person would deem necessary and proper for such a purpose.[5] Money intended for trade or business or investment or for transportation or any other purpose than as above stated cannot be regarded as baggage.[6]

Manuscript.—The manuscript of a student necessary to the prosecution of his studies was held to be baggage.[7]

Books.—It includes a student's books.[8]

Tools.—The tools of a carpenter, in value $55, was held to be baggage.[9] But where a carpenter had with him as a passenger by railway a box containing a concertina, *a rifle*, *a revolver*, *two gold chains*, *a locket*, *two gold rings*, *a silver pencil case*, a sewing machine, and a quantity of tools of his trade, such as chisels, planes, etc.; the box having been lost while in the care of the company, it was held that the articles in *italics* were ordinary personal luggage, for which the company were responsible, but that the other articles were not. It was also held, that the fact of the other articles being in the box could not prevent the passenger from recovering for such as was personal luggage.[10]

Price Book.—A price book used by a commercial traveler in his daily business is baggage within the rule of a carrier's liability.[11]

Artist, Easel.—Also the easel of an artist.[11a] In the case just cited the expression that the easel of an artist was baggage was used; but in another English case it was held that pencil sketches of an artist, placed in his portmanteau, did not form a part of his ordinary luggage, so as to entitle them to be conveyed free of charge.[12]

Jewelery.—Sufficient for personal adorn-

[2] 6 Hill (N. Y.), p. 589.

[3] Another one is that of Story on Bailments, § 499, quoted approvingly in Bowman v. Maxwell, 9 Humph. (Tenn.) p. 624. See Railroad Co. v. Fraloff, 100 U. S. 24; Hannibal R. Co. v. Swift, 12 Wall. 272; McCaffrey v. Canadian Pac. R. Co., 24 Am. L. Reg. 175; Chicago, etc. R. Co. v. Conklin, 32 Kan. 55, 3 Pac. Rep. 762; Texas, etc. R. Co. v. Capps, 23 Am. L. Reg. 685.

[4] When using the word "class" we do not understand the chief justice to refer to a political "class," but to those great divisions into which all are placed by the occupations they follow; he does not refer to titled noblemen: Railroad Co. v. Fraloff, 100 U. S. 24; Hannibal R. Co. v. Swift, 12 Wall. 272.

[5] Jordan v. Fall River R. Co., 5 Cush. 69; Weed v. Saratoga, etc. Co., 19 Wend. 534 ($285 on a trip from Saratoga to New York); Davis v. Michigan, etc. R. Co., 22 Ill. 278; Merrill v. Grinnell, 30 N. Y. 594; Illinois, etc. R. Co. v. Copeland, 24 Ill. 332 ($300 in bank bills); Whitmore v. Steamboat Caroline, 20 Mo. 513; Johnson v. Stone, 11 Humph. 621; Duffy v. Thompson, 4 E. D. Smith, 178; Hellman v. Holliday, 1 Woolw. 65; Minter v. Pac. R. Co., 41 Mo. 503.

[6] Jordan v. Fall River R. Co., 5 Cush. 69; Orange Co. Bank v. Brown, 9 Wend. 85, 24 Am. Dec. 129; Miles v. Cattle, 19 Com. L. Rep. 219 (£50); Chicago, etc. R. Co. v. Thompson, 19 Ill. 578; Doyle v. Kiser, 6 Ind. 242 ($4,000); Dunlap v. International, etc. Co., 98 Mass. 371; First National Bank v. Marietta, etc. Co., 20 Ohio St. 259, 5 Am. Rep. 655; Weeks v. New York, etc. R. Co., 17 Am. L. Reg. 506; 72 N. Y. 50; The Ionic, 5 Blatch. 538 (this was money carried as a present); Fairfax v. New York, etc. R. Co., 73 N. Y. 167, 29 Am. Rep. 119; Hutchins v. Western, etc. R. Co., 25 Ga. 61. So government bonds are not baggage: Weeks v. New York, etc. R. Co., 9 Hun, 669.

[7] Hopkins v. Wescott, 6 Blatch. 64; 7 Am. L. Reg. 533; Winter v. Pac. R. Co., 41 Mo. 503.

[8] Macrow v. Great Western R. Co., L. R. 6 Q. B. 612; 24 L. T. R. 618, 3 Alb. L. J. 476; Doyle v. Kiser, 6 Ind. 242.

[9] Porter v. Hildebrand, 14 Pa. St. 129; Davis v. Cayuga, etc. R. Co., 10 How. Pr. 330.

[10] Bruty v. Grand Trunk R. Co. of Canada, 31 Upper Canada, 66.

[11] Gleason v. Goodrich, etc. Co., 32 Wis. 85, 14 Am. Rep. 716.

[11a] Macrow v. Great Western R. Co., *supra*.

[12] Mytton v. Midland R. Co., 4 H. & N. 615.

ment.[13] But not when carried as merchandise or samples.[14]

Presents.—So gold ornaments of the value of $450 intended for presents were held not to be baggage when carried in a trunk.[15]

Watch.—The traveler's watch in his trunk.[16] These are deemed part of his wearing apparel. But not watches used as samples;[17] nor one of great value;[18] nor where there is more than one, as in this instance two silver and two gold watches.[19] And in one instance where there was only one watch a recovery was denied.[20]

Wearing Apparel.—Such as is ordinarily carried by travelers on a like journey, although not absolutely essential, for their comfort, convenience and gratification; but not unusual articles as the fanciers, habits, or idiosyncrasies of some individual may prompt him to carry. If carried for the purpose of having them safely kept and stored by carriers and hotel keepers, and not for the purpose of using them, as occasion may require, for his gratification, comfort, or convenience, the articles are not baggage.[21] Even apparel for himself and wife, and articles for the members of his family when going home, including cloth for dresses have been held such.[22] Linen cut into shirt bosoms is wearing apparel.[23] A sacque and muff carried by a gentleman was held not to be baggage.[24] A man of a family carrying home in his trunk, with other wearing apparel, cloth for a dress for his landlady, was deemed not entitled to recover for the loss of the latter.[25] A carrier may adopt a rule requiring a passenger to state that his trunk contains only wearing apparel as distinguished from merchandise; and on his refusal to so state, may refuse the trunk, without incurring liability.[26]

Samples. — As elsewhere stated, samples cannot be deemed baggage; yet by receiving and carrying them, and putting them into a warehouse for safe keeping, the carrier becomes bound to ordinary prudence in their keeping.[27]

Pistols.—A pocket pistol and also duelling pistols have been held to be baggage.[28] But where a Chicago grocer went into the country in quest of butter, it was held that, taking into consideration his habits and condition in life, more than one revolver was not reasonably necessary for his personal use and protection.[29]

Gun.—The gun of a harness maker was held to be baggage.[30]

Surgical Instruments.—Also the surgical instruments of a physician traveling in the performance of his duty.[31]

Opera Glass.—Even though the journey was made at night.[32]

Fishing Tackle.—That of a sportsman is included within the term "baggage."[33]

Finger Rings.—These are deemed part of one's wearing apparel.[34]

[13] Steers v. Liverpool, etc. Co., 57 N. Y. 1; McCormick v. Hudson River R. Co., 4 E. D. Smith, 181; Toledo, etc. R. Co. v. Hammond, 33 Ind. 379, 5 Am. Rep. 221; Brooke v. Peckwick, 4 Bing. 218; McGill v. Rowand, 3 Barr. 451. See Bruty v. Grand Trunk R. Co. of Canada, 31 Upper Canada, 66.

[14] Michigan Central R. Co. v. Carrow, 73 Ill. 348, 24 Am. Rep. 248 ($30,000 worth); Alling v. Boston, etc. R. Co., 126 Mass. 121, 30 Am. Rep. 667; Yznaga Del Valle The Richmond, 27 La. Ann. 90.

[15] The Ionic, 5 Blatch. 538; Nevin v. Bay State, etc. Co., 4 Bosw. 225 ($100 worth); Dexter v. Syracuse, etc. R. Co., 42 N. Y. 326, 1 Am. Rep. 527.

[16] Jones v. Voorhees, 10 Ohio, 145; American Contract Co. v. Cross, 8 Bush, 472, 8 Am. Rep. 471; Doyle v. Kiser, 6 Ind. 242; McCormick v. Hudson River R. Co., 4 E. D. Smith, 181.

[17] Belfast, etc. R. Co. v. Keys, 9 H. L. 556.

[18] The Ionic, 5 Blatchf. 538.

[19] Mississippi Central R. Co. v. Kennedy, 41 Miss. 671.

[20] Bomar v. Maxwell, 9 Humph. 621.

[21] Railroad Co. v. Fraloff, 100 U. S. 24, 10 Blatch. 16, 19 Am. L. Reg. 36. A foreigner carrying a large quantity of very valuable laces; she was a Russian of high standing, and recovered their value: Curtis v. Delaware, etc. R. Co., 74 N. Y. 116.

[22] Dexter v. Syracuse, etc. R. Co., 42 N. Y. 326, 1 Am. Rep. 527.

[23] Duffy v. Thompson, 4 E. D. Smith, 178.

[24] Chicago, etc. R. Co. v. Boyce, 73 Ill. 510, 24 Am Rep. 268.

[25] Dexter v. Syracuse, etc. R. Co., 42 N. Y. 326, 1 Am. Rep. 527.

[26] Norfolk, etc. R. Co. v. Irvine, 5 S. E. Rep. 532; 7 S. E. Rep. 233.

[27] Pennsylvania Co. v. Miller, 35 Ohio St. 541, 35 Am. Rep. 620. See generally, Stinson v. Connecticut River R. Co., 98 Mass. 83.

[28] Woods v. Devin, 13 Ill. 746; Davis v. Michigan, etc. R. Co., 22 Ill. 278.

[29] Chicago, etc. R. Co. v. Collins, 56 Ill. 212.

[30] Davis v. Cayuga, etc. R. Co., 10 How. Pr. 330. So is that of a sportsman: Macrow v. Great Western, R. W., L. R. 6 Q. B. 612, 3 Alb. L. J. 476, 24 L. T. R. 618; Van Horn v. Kermit, 4 E. D. Smith, 453.

[31] Hannibal Railroad v. Swift, 12 Wall. 262. Or a dentist's tools: Brock v. Gale, 14 Fla. 523, 15 Am. Rep. 356.

[32] Toledo, etc. R. Co. v. Hammond, 33 Ind. 379, 5 Am. Rep. 221.

[33] Macrow v. Great Western R. Co., *supra*.

[34] McCormick v. Hudson River R. Co., 4 E. D. Smith, 181.

*In what Instance Personal Property has been held not to be Baggage.* — Merchandise. — When not informed that it is in the trunk.[35]

Napkin Rings.—When carried by a gentleman, held not to be baggage.[36]

Bedding.—A feather bed of a female passenger from Ireland to this country is not baggage.[37] Nor bedding unless used on the way,[38] nor window curtains, blankets, or cutlery.[39]

Legal Papers. — In England it was held that "ordinary luggage" "does not include title deeds belonging to a client which an attorney is carrying with him in his bag or portmanteau, for the purpose of procuring a new trial in a court of justice; nor bank notes (to a considerable amount) carried by him for the purpose of meeting the contingencies of the suit."[40]

Toy.—A child's spring horse seventy-eight pounds in weight, and forty-four inches in length was held not to be personal luggage within the regulation of a railway company allowing passengers 112 pounds.[41]

Masquerade Customs. — Such cannot be considered baggage when shipped to a place with the design to let them out for hire.[42]

Hand-Cuffs. — Baggage does not include hand-cuffs.[43]

Medicine. — Perhaps medicine is not included.[44]

Silver Ware.—Such ware carried in trunks is not baggage.[45]

Live Animals.—Live animals—in this case a dog—cannot be classed as baggage. But where a baggage master took charge of a dog, not permitting the owner to have it in the passenger coach, and delivered it to another person at a way-station, the company was held liable for negligence; and that, too, where the fee paid for the dog's carriage went to the baggage master.[46]

*Property Accepted as Baggage.* — Where personal property is knowingly accepted as baggage, as stated in the principal case, the carrier will be held to the same accountability as if it were baggage.[47] In England the acceptance of a trunk containing both baggage and merchandise, the company knowing at the time of the acceptance that merchandise is contained in the trunk, renders the company liable for the transportation of such merchandise as baggage. This is true, even though nothing is said about it, if it is carried openly, or so packed that its nature is obvious, and the carrier does not object to it.[48]

In Minter v. Pacific Railroad,[49] it appeared that the passenger delivered his trunk and a piece of carpeting to the baggage master of a railroad company who checked the trunk, but told the passenger that no check was necessary for the carpet, as it would go safely. It was held that the company was liable for the loss of the carpet, although the action of the baggage master was in violation of the rules of the company. This was receiving merchandise as baggage, knowing it to be such. In Dakota the receiving of a box which contained merchandise, no notice of its contents having been given or asked, it was held to render the company liable for its loss. This case cannot be said to be in harmony with the greater number of the cases.[50]

Thus, in Minnesota, it was held that a common carrier has a right to assume that a valise

[35] Cincinnati, etc. R. Co. v. Marcus, 38 Ill. 220; Michigan Central R. v. Carrow, 73 Ill. 348; Collins v. Boston, etc. R., 10 Cush. 506; Pardu v. Drew, 25 Wend. 457; Hannibal Railroad v. Swift, 12 Wall. 262; Macrow v. Great Western R., *supra;* Cahill v. London, etc. R., 18 Q. B. (N. S.) 818; Great Northern R. v. Shepherd, 8 Exch. 30; Haines v. Chicago, etc. R., 29 Minn. 160, 43 Am. Rep. 199; Blumantle v. Fitchburg R., 127 Mass. 322, 34 Am. Rep. 376; Dibble v. Brown, 12 Ga. 217; Smith v. Boston, etc. R., 44 N. H. 325; Hawkins v. Hoffman, 6 Hill, 586; Richards v. Wescott, 2 Bosw. 589, 7 *Id* 6; Cahill v. L. & N. W. R., 10 C. B. (N. S.) 154; Chamberlain v. Western Trans. Co., 45 Barb. 218.

[36] Chicago, etc. R. v. Boyce, 73 Ill. 510.

[37] Connolly v. Warren, 106 Mass. 146, 8 Am. Rep. 300. See Parmlee v, Fisher, 22 Ill. 212.

[38] Texas, etc. R. v. Ferguson, 9 Am. & Eng. R. R. Cas. 395; Ommit v. Henshaw, 55 Vt. 605; Macrow v. Great Western R., *supra.*

[39] McCaffrey v. Canadian Pacific R., 24 Am. L. Reg. 175.

[40] Phelps v. London & Western R., 19 C. B. (N. S.) 321, 11 Jur. (N. S.) 652, 34 L. J. C. 259, 13 W. R. 782, 12 L. T. (N. S.) 496.

[41] Hudston v. Midland R., L. R. 2 Q. B. 366, 10 B. & S. 504, 38 L. J. Q. B. 213, 17 W. R. 705, 20 L. T. (N. S.) 526.

[42] Michigan, etc. R. v. Oehm, 56 Ill. 293.

[43] Bonner v. Maxwell, 9 Humph. 629.

[44] Bonner v. Maxwell, *supra.*

[45] Bell v. Drew, 4 E. D. Smith, 59.

[46] Couthing v. Hannibal, etc. R., 54 Mo. 385.

[47] Parmelee v. Lowitz, 74 Ill. 116; Belfast, etc. R. v. Keys, 9 H. L. Cas. 556, 9 W. R. 793, 4 L. T. (N. S.) 841, 8 Jur. (N. S.) 367; Slomon v. Great Western R., 67 N. Y. 208; Perley v. New York Cent. etc. R., 65 N. Y. 374.

[48] Cahill v. London, etc. R., *supra;* affirmed on appeal, 13 C. B. (N. S.) 818, 8 Jur. (N. S.) 1063, 31 L. J. C. P. 271, 10 W. R. 391; Great Northern R. v. Shepherd, 8 Exch. 30, 7 Railway Cas. 310, 21 L. J. Ex. 286.

[49] 41 Mo. 503.

[50] Waldron v. Chicago, etc. R., 1 Dak. Ter. 351.

offered him by a passenger as baggage contains only personal effects, and is not responsible for general merchandise contained in it.[51] This is the general rule.

In Massachusetts a railway passenger had merchandise checked without disclosing its character. There was no evidence of any agreement to carry it as freight, nor that the baggage master had any authority to receive it as freight or as personal baggage. It was held that the company was not responsible for its loss, although the baggage master knew the character of the baggage, and received similar packages from others.[52]

This case is directly opposed to Sloman v. Great Western R. W. Co.,[53] and in a measure of the doctrine of a large majority of the cases cited previously.[54]

*Remarks.*—It is manifest from a reading of the cases cited that "the convenience required for the journey which has been taken, the duration of the absence," and the object of the journey, must all be considered in determing whether the personal property in question is baggage.[55] The length of the journey is always considered in determining what is baggage.[56]

*Question for Jury.*—It is a question for the jury to determine what articles of property, as to quantity, quality or value, contained in a passenger's trunk or valise, may be deemed baggage (subject to the power of the court to correct any abuse); and it is improper for the judge to designate by name what articles may be included in the term baggage of a traveler.[57]

Yet in a Pennsylvania case it was said that "it is not obvious in what manner the court can restrict the quantity or value of the article that may be deemed proper or useful for the purpose of traveling, because in the nature of things it is susceptible of no precise or definite rule; and when there is an attempt to abuse the privilege, a court must rely on the intelligence or integrity of the jury to apply the proper corrective."[58]

So in another case it was declared of certain laces lost: "Whether they were such articles in quality and value as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification, or comfort while traveling, was not a pure question of law for the sole and final determination of the court, but a question of fact for the jury, under proper guidance from the court as to the law governing such case. It was for the jury to say to what extent, if any, the baggage of the defendant in error exceeded in quantity and value that which was usually carried without extra compensation, and to disallow any claim for such excess."[59]

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[51] Haines v. Chicago, etc. R., 29 Minn. 160, 43 Am. Rep. 199.

[52] Blumantle v. Fitchburg Railroad, 127 Mass. 322, 34 Am. Rep. 376.

[53] 67 N. Y. 208.

[54] See Hannibal Railroad v. Swift, 12 Wall. 262.

[55] Curtis v. Delaware, etc. R., 74 N. Y. 116, 30 Am. Rep. 271; Parmelee v. Fischer, 22 Ill. 212; Hannibal Railroad v. Swift, 12 Wall. 262.

[56] Parmelee v. Fischer, *supra;* Railroad Co. v. Fraloff, 100 U. S. 24, 10 Blatchf. 16; Hannibal Railroad v. Swift, *supra.*

[57] Brock v. Gale, 14 Fla. 523, 14 Am. Rep. 356.

[58] McGill v. Rowland, 3 Barr. 451.

[59] Railroad Co. v. Fraloff, 100 U. S. 24.

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CONFLICT OF LAWS—INJURY RESULTING IN DEATH — SURVIVAL — PENAL STATUTE — EXTRATERRITORIAL FORCE.

O'REILLY V. NEW YORK, ETC. R. CO.

*Supreme Court of Rhode Island, May 4, 1889.*

1. Where injuries resulting in death are received in one State, the cause of action not surviving at common law, and no statute of that State being pleaded showing the survival, an action cannot be waived for such injury by the deceased's personal representative in another State.

2. Where a foreign statute is penal in its nature, and a similar statute of the State in which the action is brought contains none of such penal features, the foreign statute cannot be enforced in the latter State.

DURFEE, C. J., delivered the opinion of the court:

The declaration contains two counts, which are severally demurred to. The cause of action set forth in the first count is an injury to the plaintiff's intestate resulting from the negligence of the defendant corporation. The injury was caused by collision between a locomotive with train of cars, running on the defendant's railroad, and a buggy, in which the intestate was driving along a common highway across said railroad at grade, at a place alleged to be in the commonwealth of Massachusetts. The count alleges that the intestate was greatly injured, her limbs broken, and that after much suffering she died. The plaintiff sues for $30,000 damages. The count is in form a count in an action of trespass on the case at common law, but it does not allege that the action survives in Massachusetts under any law or stat-

ute of that State; and the defendant contends that, without such allegation, the count is bad, since it does not survive at common law, and, if it survives under any statute of that State, the existence of the statute must be pleaded like any other fact which is essential to the maintenance of the action, inasmuch as, being the statute of another State, the court will not take judicial notice of it. We think the point is well taken. The cause of action accrued in Massachusetts under and in virtue of the law in force there, and if under the law of that State the action no longer exists there it no longer exists here. In Needham v. Railroad Co., 38 Vt. 294, the action was case for negligence resulting in injury and subsequent death to the plaintiff's intestate. The negligence and injury happened in New Hampshire, and the action was brought in Vermont, One question was whether the action for the suffering endured by the intestate prior to his death would survive in Vermont under the statute of survivorship of that State, there being no statute under which it would survive in New Hampshire. The court held that it would not. "It is conceded," say the court, "that the injury was received in the State of New Hampshire; consequently his cause of action accrued in that State. By the common law the cause of action which accrued to the intestate in that State is extinguished by his death, By the law of that State no right exists in the personal representatives to recover for such injury, and, if this action can be maintained under the provisions of the act of 1847 or 1849, it must be upon the ground that our statutes have an extraterritorial force. The fact that the intestate was a citizen of this State at the time of the injury is entirely immaterial in the decision of this question. A general or public act is an universal rule that regards the whole community, but its operation is limited to the State by which it was enacted. * * * A cause of action which by the rules of the common law is extinguished by the death of the party is by such death fully discharged, unless it survives by force of some statute law of the State where it accrued." And so in Davis v. Railroad Co., 143 Mass. 301, 9 N. E. Rep. 815, the plaintiff's intestate, a citizen of Massachusetts, received an injury while traveling in Connecticut as a passenger on the defendant's railroad, from which she subsequently died; the charge being that the injury resulted from the defendant's negligence. There was no statute in Connecticut under which the common-law action for such an injury survived. The plaintiff sued, as administrator of the deceased, in Massachusetts, in a common-law action, claiming that the cause of action might be held to have survived under the Massachusetts statute of survivorship, notwithstanding it had ceased to exist in Connecticut; but the court held that it was for the State where the injury was received to say what should be the liability for it, and that subsequently, as the liability at common law had come to an end in Connecticut by the death of the injured party, it could not survive in Massachusetts, the Massachusetts statute having no force beyond its own boundaries. These two cases are precisely in point, except that in them it appeared as a proved or admitted fact that there was no survivorship of the causes of action in the States where they accrued. Le Forest v. Tolman, 117 Mass. 109; Whitford v. Railroad Co., 23 N. Y. 465, also 3 Bosw. 67; Crowley v. Railroad Co., 30 Barb. 99; McCarthy v. Railroad Co., 18 Kan. 46.

It is not strict right, but comity, which enables a person who has been tortiously injured in one State to sue for damages for the injury in another; and, of course, after the cause of action has become extinct where it accrued, it cannot, as a mere matter of comity, survive elsewhere. The defendant urges that it is to be presumed that the law of Massachusetts is the same as the law of Rhode Island, until the contrary is shown. The older States of the Union were settled by English colonists, who brought with them their heritage of English common law, as it had been modified and improved by English statutes; and therefore it is that the courts of any one of these States, in cases which call for the application of the law of any other of them, may reasonably presume, and do presume, that the common law, as it prevails in such other State, is the same as it is in their own, and also extend the presumption to the newer States which are offshoots from them. But in regard to the statute law of the States there is no basis for any such presumption; for, as is well known, the statutes of the several States are enacted by the legislature of the several States to suit themselves, each consulting only its own policy, interest, or necessities, and must therefore, from the nature of things, be different in different States, except when occasionally one State copies from another, however much similiar circumstances may lead to similar legislation. The distinction thus pointed out, though it has been sometimes overlooked, is recognized in the better considered cases, which hold, and we think rightly, that the presumption above stated, in regard to the common law, does not extend to the statute law of the States. It follows that we cannot presume that there is in Massachusetts, as there is in this State, a statute of survivorship, under which the cause of action declared on in the first count survives, and also, inasmuch as the existence of such a statute in Massachusetts is essential to the maintenance of the action, that the count is bad in not alleging the existence of such a statute. Debevoise v. Railroad Co., 98 N. Y. 377; McDonald v. Mallory, 77 N. Y. 546; Cutler v. Wright, 22 N. Y. 472; State v. Railroad Co., 45 Md. 41; Murphy v. Collins, 121 Mass. 6; Morrissey v. Ferry Co., 47 Mo. 521, 625; Palfrey v. Railroad Co., 45 Md. 41. The demurrer to the first count is sustained.

The second count is designed to subject the defendant corporation to liability under a statute of Massachusetts. Pub. St. Mass. ch. 112, §§ 163, 212, 213. The count is defective in some partic-

ulars, but counsel, waiving these defects for the present, have asked us to decide whether the action is maintainable in this State. The liability is imposed by § 213. That section provides that if a person is injured by collision with the engines or cars of a railroad corporation at a crossing, such as is described in § 163, and it appears that it neglected to give the signals required by § 163, and that such neglect contributed to the injury, the corporation shall be liable, in case the life of the person so injured is lost, to damages recoverable by the executor or administrator of the deceased in an action of tort, as provided in § 212, unless it is shown that, in addition to a mere want of ordinary care, the person injured was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of law, and that such gross or wilful negligence or unlawful act contributed to the injury. Section 212 subjects railroad corporations to liability where, by reason of their carelessness, the life of a passenger, or of a person being in the exercise of due diligence, and not a passenger or in their employment is lost. The provision for such case is that the offending corporation may be punished by fine or indictment, or sued for damages in an action of tort, the fine imposed or the damages recovered, according as the one or the other remedy is pursued, to be not less than $500 nor more than $5,000; the damages, in case the corporation is civilly prosecuted, "to be assessed with reference to the degree of culpability of the corporation, or of its servants or agents." The fine is to be paid "to the executor or administrator for the use of the widow and children of the deceased in equal moieties, or if there are no children, to the use of the widow, or, if no widow, to the use of the next of kin;" and in case of a civil action, which is to be brought by the executor or administrator, the damages recovered are to go in the same manner. The remedy, whether criminal or civil, is to be prosecuted within a year after the injury. The reqirement of § 163 is that every locomotive shall be furnished with a bell and steam-whistle, and that the bell shall be rung or the whistle sounded at the distance of at least 80 rods from every grade crossing, and be kept ringing or sounding, continuously or alternately, until the engine has passed. The claim is that the injury to the intestate resulted from an omission to ring the bell or sound the whistle as required. It will be seen that the statute creates an entirely new cause of action, giving the executor or administrator of the deceased power to prosecute it; not, however, in his representative capacity, since he is empowered to prosecute, not for the benefit of the estate, but for the use of certain designated persons. The question is whether an executor or administrator, appointed in Rhode Island, shall be taken to have the right to prosecute the action in the courts of Rhode Island. Similar questions, arising under somewhat similar statutes, have been differently decided by different tribunals, The following cases hold that such an action is not maintainable out of the State by which it is authorized: Richardson v. Railroad Co., 98 Mass. 85; Woodward v. Railroad Co., 10 Ohio St., 121; Taylor's Adm'r v. Pennsylvania Co., 78 Ky. 348; McCarthy v. Railroad Co., 18 Kan. 46; Vawter v. Railway Co.. 84 Mo. 679. See, also, Anderson v. Railroad Co., 37 Wis. 323; Pickering v. Fisk, 6 Vt. 102; Judge of Probate v. Hibbard, 44 Vt. 597; Railroad Co. v. Cragin, 71 Ill. 177. The following cases allow such an action: Dennick v. Railroad Co., 103 U. S. 11; Leonard v. Navigation Co., 84 N. Y. 48; Stoeckman v. Railroad Co., 15 Mo. App. 505. The ground of decision in the two last-named cases is that the cause of action accrued under a statute which, notwithstanding some minor differences, was substantially the same as a statute of the State in which the action was brought. The decision in Dennick v. Railroad Co., rests on that and more general grounds of comity. The liability in question in each of said three cases, however, was remedial, not penal; the rule of liability being no more exacting than it would have been in favor of the deceased if he had survived, and the damages recoverable being recoverable as compensation. We have in this State a statute subjecting railroad corporations to liability for negligence resulting in death (Pub. St. R. I. ch. 204, §§ 15-18), but it differs materially from the Massachusetts statute, especially in that it has none of the penal features of that statute. For this reason we do not think it necessary to decide which of these two sets of cases above cited lays down the truer doctrine, for it seems to be well settled that each of the States will be left by the others solely to itself to give effect to its penal legislation. Com. v. Green, 17 Mass. 514, 540; Hunt v. Bownal, 9 Vt. 417; Scoville v. Canfield, 14 Johns. 339; Brigham v. Claflin, 31 Wis. 610; Bank v. Price, 33 Md. 488; Halsey v. McLean, 12 Allen 438; Derrickson v. Smith, 27 N. J. Law, 166; Bird v. Hayden, 2 Abb. Pr. (N. S.) 61. That the liability imposed by the Massachusetts statute is penal is very clear. The damages as we construe the provision, are directed "to be assessed with reference to the degree of culpability of the corporation, or of its servants or agents," and to the amount of at least $500. These directions clearly show a primitive purpose. So likewise, confirmatorily at least, does the direction that the recovery shall not be prevented by contributory negligence, unless it be gross or wilful. One of the remedies given by section 212 is an indictment, the fine prescribed in case of conviction being not less than $500 nor more than $5,000. The same remedy is given by section 213, if the injury be not mortal. It would seem that where death ensues there is provision only for a civil action, but the provision is part and parcel of legislature, which has its penal purposes thus clearly stamped upon it. Our conclusion is that an action founded on said provision is not maintainable in this State, and that the demurrer to the second count must be sustained.

NOTE.—The decision of the principal case seems to be sound. "It is not strict right, but comity," says the opinion, "which enables a person who has been tortiously injured in one State to sue for damages for the injury in another; and, of course, after the cause of action has become extinct where it accrued, it cannot, as a matter of comity, survive elsewhere." Statutes have no inherent extraterritorial force, and "whatever force and obligation the laws of one country have in another, depends solely upon the law or municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express and tacit consent." [1] And, as said in the principal case, the laws of another country or State are never enforced as a matter of right, but only as a matter of comity, and this comity is never extended to laws repugnant to the polity or prejudicial to the interests of the State.[2]

It may be stated, as a general proposition that, courts of one State will not enforce statutory laws of another, or presume them to be the same as their own,[3] for the reason they have no extraterritorial force,[4] unless there is a similar statute founded upon the same general grounds where suit is brought. This rule is usually applied in garnishment proceedings,[5] as well as in actions for tort, or injuries causing death, as in the principal case.[6] And it has been held that an action for a foreign tort may be maintained, although there is no statute covering the wrong in the State where suit is brought.[7]

The Supreme Court of the United States has declared the rule to be that whenever, either by the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matter, and can obtain jurisdiction of the parties. But the case in which the question arose did not justify so broad a statement of the principle. The plaintiff's husband had received injuries in New Jersey, through the negligence of defendant, which resulted in death. The action was prosecuted in New York. The statutes of New Jersey and New York appeared to be substantially the same, and the plaintiff was permitted to recover in New York.[8] The case is an interesting one and review the authorities quite fully. There is a good note appended to the case, published in the CENTRAL LAW JOURNAL,[9] by M. A. LOW, Esq., in which an attempt is made to demonstrate that the rule stated is not sound, althovgh the decision was correct.

In the principal case it appears that no statute of the State in which the injury occurred was pleaded showing that such actions survived, and the court refused to presume that such a statute existed. This is undoubtedly the correct view, for no recovery can be based upon a foreign statute without pleading it.[10] And the court very properly points out with respect to statutory law that no presumptions may be taken that it is the same as the law of the forum, as is the case with the general rules of the common law. The right of action for injuries resulting in death did not exist at common law,[11] it being wholly of statutory origin. The rule has been laid down that the right of recovery for such injury exists only by virtue of the law of the place of the injury.[12] Some cases have held that foreign States cannot enforce such statutes,[13] while others, as has been pointed out, hold just the contrary.[14] However, the principal case is not based upon either of these classes of cases, but it rests upon two main grounds: (1), that as the statute of the State where the injury incurred, showing the existence or survival of the right of action, was not pleaded, such right would not be presumed, and (2), that as the foreign statute was penal in its nature, its provisions could not be enforced in the local court, whose statutory law was materially different, being lacking in the penal features.

The rule appears to be well established that where a statute enjoins a duty to be performed by the officers of a corporation, and makes them individually liable for the debts of the corporation, such liability being in the nature of a penalty, will not be enforced extraterritorially.[15] EUGENE MCQUILLIN.

1 Story on Conflict of Laws, § 23.

2 Baub. v. Earl, 13 Pet. 519; Story on Conflict of Laws, §§ 36, 37; 2 Kent's Com. 458; Blanchard v. Russell, 13 Mass. 6. See note to Askew v. LaCygne Exchange Bank (S. C. Mo.), 24 Am. Law Reg. (N. S.) 403-442. for a full collection of authorities on this point.

3 Green v. Van Buskirk, 5 Wall. 307; 7 Wall. 150; Thompson v. Waters, 23 Mich. 214; Fant v. Miller, 17 Gratt. 47; Briggs v. Lawrence, 3 T. R. 450; Ludlow v. Van Benselaer, 1 Johns. 94; Pickering v. Fish, 6 Vt. 102; Cambioso v. Moffit, 2 Wash. C. C. 98; James v. Catherwood, 3 Daw. & Ry. 190.

4 Rhaum v. Pierce (S. C. Ill.), 18 Cent. L. J. 491; Railroad Co. v. Thompson (S. C. Kan.), 18 Cent. L. J. 192; Railroad Co. v. Sprayberry, 9 Heisk. (Tenn.) 852.

5 See article on "Interstate Garnishment, 27 Cent. L. J. 424-428; Mo. Pac. R. Co. v. Maltby, 23 Cent. L. J. 157; note to Askew v. LaCygne Exchange Bank (S. C. Mo.), 24 Am. Law Reg. (N. S.), pp. 403-412.

6 Leonard v. Columbia, etc. Nav. Co., 12 Cent. L. J. 377; 84 N. Y. 48; Boyce v. Railroad Co., 63 Iowa, 70, 18 N. W. Rep. 673. See commedts in 18 Cent. L. J. 421; same, with full citation of authorities in 17 Cent. L. J. 81; note to Dennick v. Cent. R. Co. (S. C. U. S.), 12 Cent. L. J.—, by M. A. Low, Esq., criticising the opinion, with full citation of cases.

7 Dennick v. Railroad Co., 103 U. S. 11, 12 Cent. L. J. 393; Leonard v. Steam Nav. Co., 84 N. Y. 48, 12 Cent. L. J. 377; Railroad Co. v. Doyle, 8 Am. & Eng. R. R. Cas. 171.

8 Dennick v. Cent. R. Co., 103 U. S. 11, 12 Cent. L. J. 393. See Usher v. West Jersey R. Co. (Pa.), 4 Lawyers' Rep., anno. 261, with note.

9 12 Cent. L. J. 396, 397. See also criticise of case in 12 Cent. L. J. 487.

10 Great Western R. Co. v. Miller, 19 Mich. 305; Hyde v. Railroad Co., 61 Iowa, 441, 1 Denv. L. J. 302; 17 Cent. L. J. 398.

11 Baker v. Bolton, 1 Camp. 493; Carey v. Railroad Co., 1 Cush. 475; Palfrey v. Railroad Co., 4 Allen 55; Hyde v. Railroad Co., 61 Iowa, 441. See articles in 17 Cent. L. J. 141, on "Survival and Assignment of Actions," 2 Cent. L. J. 128, 165; Shields v. Yonge, 15 Ga. 349.

12 Whitford v. Railroad Co., 23 N. Y. 465; State to use, etc. v. Railroad Co., 45 Md. 1; Horer v. Railroad Co., 25 Ohio St. 667; Story on Conflict of Laws, § 307. See "Note and Queries," 2 Cent. L. J. 352, 353.

13 See cases cited in principal case.

14 See cases above cited.

15 First Nat. Bank v. Price, 33 Md. 487; Erickson v. Nesmith, 4 Allen, 233; Erickson v. Nesmith, 46 N. H. 371; Halsey v. McLean, 12 Allen, 438; Derricson v. Smith, 27 N. J. L. 166.

## JETSAM AND FLOTSAM.

PHILADELPHIA LAWYER. — Notwithstanding the well known fact that the legitimate fees for legal business of this city have fallen off more than one-half during the last five years, and without any prospect of improvement, we are steadily multiplying lawyers, and a large number of them must either steal or

starve. Our professions are overcrowded by young men, because many of them seem to think it more genteel to steal or starve than to earn a good living by non-professional labor. Even successful mechanics disparage their honest and respected industry with their own sons by encouraging them to climb or crawl into professions, and they do it in the face of the known fact that many of them must steal or starve. There are over 500 lawyers in this city who do not earn in legitimate fees as much as the average mechanic who works an average of eight hours per day, and most of these pitiable dependants have no reasonable prospect of ever earning an honest living by their profession. There is no want for them; there is no business for them to get, and the false dream of gentility in a profession ends in the sober reality that compels them to steal or starve.—*Philadelphia Times.*

## RECENT PUBLICATIONS.

MARTINDALE ON CONVEYANCING. Metcalfe's Edition. A Treatise on the Law of Conveyancing. By W. B. Martindale. Second Edition. By Lyne S. Metcalfe, Jr. Editor of the Central Law Journal. Central Law Journal Company: St. Louis. 1889.

Martindale on Conveyancing first appeared in 1882. It is the first and only distinctively American treatise on this subject. The immediate success of the work fully attested its value. Few American law books have been so eagerly sought. The first edition was very soon exhausted. This fact furnishes the best evidence of the great merits of the work. The present revision has been carefully done by Mr. Lyne S. Metcalfe, Jr. the learned editor of the CENTRAL LAW JOURNAL, whose valuable labor on the first edition well qualified him for his present talk.

The work presents, in a convenient form for ready reference, a concise, yet somewhat comprehensive view of the Law of Conveyancing, applicable to all the States. The topics are considered with reference to general principles, and the treatment demonstrates a remarkable amount of judicious condensation. All propositions of law are tersely and accurately stated, and supported by numerous well selected cases from the courts of last resort of the various States, as well as references to statutes, thus rendering the work of great practical value to the practitioner and conveyancer in whatever part of the Union. Upwards of 6,300 cases were cited in the first edition. The present edition reviews nearly 1000 later cases, which have been decided since 1882, together with recent State statutes on the various topics discussed. Such alterations of the original text as were deemed necessary by reason of the recent developments and changes in the law of conveyancing, have been made.

The admirable analysis and arrangment of subjects will greatly facilitate the use of the volume. The work consists of 750 pages, and is divided into four principal titles. The first treats of the purchase deed, the second of leases, the third of mortgages, and the last of wills. The subdivision also, of the respective titles, as well as the more specific analysis and sectionizing throughout, demonstrates excellent discrimination. The title on Deeds embraces four chapters. The general nature of deeds is first considered, including the statutory and common law requisites as to matter, parties, ect., with a discussion of fraudulent conveyances. Chapter II. considers the formal parts of a deed, discussing the various forms, date, names of parties, the recital, the consideration, the granting clause, the description, the *habendum*, the *reddendum* and the *testimonium* clause, with articles as to conditions, limitations, uses, trusts, powers and covenants for title. The execution of deeds is fully treated in the third chapter; while the fourth deals with the acknowledgement, proof and registration. The subject of Leases is considered under three general heads: The first includes the nature, different species and parties; the second, the formal parts; and the last, the execution, assignment and determination. The same admirable analysis appears in the title on Mortgages, which is discussed under five general subdivisions, namely, (1) nature and history; (2) form and requisites; (3) assignments, including the law relating to the purchaser of the equity of redemption; (4) redemption, payment and discharge; and (5) foreclosure. Fifty pages are assigned to the subject of Wills. While the treatment is necessarily condensed, yet it is sufficiently full to explain how the title to real estate may be conveyed by virtue of these instruments. Four chapters are devoted to this topic, as follows: (1) The general requisites of a valid devise; (2) revocation and republication; (3) probate and registration; and (4) construction.

The system of catch-words, heading each section, a characteristic feature of the well prepared modern text-book, indicate precisely the matter treated, thus the work of the searcher is immensely lightened.

All the above valuable material is rendered accessible by a full index. It would seem that this feature should follow as a matter of course. However it is well known that to many otherwise excellent treatises are appended indifferent or incomplete indexes, necessitating time and labor to reach the material within.

E. M.

### BOOKS RECEIVED.

A BRIEF on The modes of Proving the Facts Most frequently in issue or Collaterally in question on The Trial of Civil or Criminal Cases. By Austin Abbott of the New York Bar. Diossy & Co. New York.

LAWYERS' REPORTS, ANNOTATED. BOOK III. All current cases of General Value and Importance decided in The United States, State and Territorial Courts, with full Annotation, by Robert Desty, Editor. Edmond H. Smith, Reporter, Burdett A Rich, Editor in chief of the United States and General Digests, and the Several Reports and Judges of each court, Assistants in Selection. (2 L. R. A.) Rochester, N. Y.: The Lawyers' Co-Operative Publishing Co. 1889.

## HUMORS OF THE LAW.

TWO Irishmen were walking under the gibbet of Newgate. Looking up at it, one of them remarked,—"Ah, Pat, where would you be if the gibbet had done its duty?"

"Faix, Flannagan," said Pat, "an' I'd be walking London—all alone."

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.**

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1. ADMINSITRATOR. — An administrator is an officer appointed by the court to discharge certain duties. As such he must be considered as present before the court, in the nature of a party in the proceedings then pending. Prescription has no commencement in his favor, at least before the homologation of his final account.— *Heirs of McGehee v. McGehee*, La., 6 South. Rep. 253.

2. ADMIRALTY. — Plaintiff leased to defendants two scows and a tug to carry lumber, the contract providing that defendants assumed all liability for loss or damage to the cargoes from any cause, and that neither the plaintiff nor the tug and scows should be responsible for any loss. The lumber was damaged by water: *Held*, that as nothing was said on the question of seaworthiness in the contract, there was an implied warranty to that effect, and the question as to whether the injury was caused by leakage, through unseaworthiness, for which plaintiff would be liable, or by water washed in from above, which was defendant's risk, was a question for the jury.— *Lyon v. Tiffany*, Mich., 42 N. W. Rep. 1098.

3. ADVERSE POSSESSION.— Under Code Civil Proc. Cal. § 325, as amended in 1878, relating to title by adverse possession, and requiring in addition to such possession, the payment by the claimant of "all taxes which have been levied and assessed upon such land," a claimant is not excluded from the benefit of his plea unless the property was actually assessed, even though it may have been his fault that it was not assessed. — *Coonradt v. Hill*, Cal., 21 Pac. Rep. 1099.

4. ATTACHMENT. — The suit of plaintiff for damages was founded on an attachment bond, which provided in statutory language for "all such damages as he may sustain by the wrongful or vexatious suing out of said attachment:" *Held*, that plaintiff was not entitled to recover unless it was shown that the issuance of the writ was wrongful in the sense that the facts on which it was based did not exist. — *Calhoun v. Hannon*, Ala., 6 South. Rep. 291.

5. ATTACHMENT.—The failure to entitle an affidavit for attachment, made in a pending cause, does not invalidate it, where it is fully identified by being annexed to the writ, which give the full title of the cause.— *Beebe v. Morrell*, Mich., 42 N. W. Rep. 1119.

6. ATTACHMENT. — Where plaintiff sues for damages caused by wrongfully suing out an attachment on the ground that he was about to dispose of his property with intent to defraud his creditors, plaintiff can show that all the money received by him in his business, other than that necessary for his family, was used to pay his debts. — *Kaufman v. Armstrong*, Tex., 11 S. W. Rep. 1048.

7. ATTACHMENT — Res Judicata. — S levied an attachment on certain goods of plaintiffs. The next day C also levied an attachment on the same and other goods of plaintiffs. In the attachment suit brought by C against plaintiffs, the latter recovered a verdict in reconvention against C for wrongful attachment: *Held*, that the judgment in reconvention against C was no bar to a suit by plaintiffs against S for damages for wrongful attachment, when the evidence showed that there was no concert and co-operation between S and C in the levying of the attachments. — *Torrey v. Schneider*, Tex., 11 S. W. Rep. 1168.

8. ATTACHMENT BOND.—The obligors upon a statutory attachment bond are liable to the defendant upon the bond for all costs which way be awarded to him in the action, and not merely for such as may result from the attachment. — *Greaves v. Newport*, Minn., 42 N. W. Rep. 1059.

9. BOND—Exemption. — The fact that a constable has demanded and accepted an indemnity bond does not estop him from making the defense to an action on his bond for failure to make the levy that the property of the debtor was exempt. — *Coville v. Bentley*, Mich., 42 N. W. Rep. 1116.

10. CARRIERS — Passengers. — Allegations that while plaintiff was lawfully riding on defendant's passenger train, which was in the exclusive charge of its agents and servants, the car was derailed and overturned "by the gross negligence, carelessness, and default of the defendant company, its agents, servants, and employees," are sufficient, without alleging any particular acts of negligence. — *Gulf, etc. Ry. Co. v. Smith*, Tex., 11 S. W. Rep. 1104.

11. CHATTEL MORTGAGES. — Where one who wished to borrow money of complainants proposed to secure them by a mortgage on certain crops, and on all his mules and horses, representing that there were a certain number, and complainant's accepted a mortgage on that number, equity will not reform it so as to make it cover all the mules and horses which the mortgagor had, though he had a larger number than he represented.—*Comer v. Lehman*, Ala., 6 South. Rep. 264.

12. CHATTEL MORTGAGE. — Where a mortgagee sells mortgaged property, and afterwards gives the first mortgagor a second mortgage on other property in lieu thereof, the second security is a sufficient consideration for the surrender of the lien, and constituted the second a valid contract. — *Cabò v. Malone*, Ala., 6 South. Rep. 299.

13. CONSTITUTIONAL LAW.—The act entitled "An act to amend the charter of the town of Bessemer, and to reincorporate the same as the city of Bessemer, and to establish a charter therefor," is not affected by the constitutional provision that "each law shall contain but one subject, which shall be clearly expressed in its title." The fact that the title contains more than one subject is immaterial if the act itself contains but one of them. — *Judson v. City of Bessemer*, Ala., 6 South. Rep. 267.

14. CONTRACT. — A contract for services in securing a pardon of one convicted of crime is not illegal, if the employment of improper methods is not contemplated. —*Moyer v. Cantieny*, Minn., 42 N. W. Rep. 1060.

15. CONTRACT — Assumpsit. — *Assumpsit* will not lie to recover a balance due on a special contract to erect a building, and it is not necessary to allege the performance of all the conditions to be performed before payment was due. — *Castagnino v. Balletta*, Cal., 21 Pac. Rep. 1097.

16. CONTRACT.— According to the usage and discipline of the Presbyterian church in the United States, the call of a congregation for the services of a regular pastor, and the proceedings of the parties under it, are subject to the decision of the presbytery having jurisdiction, and the regular pastoral relation is constituted by the presbytery after the due acceptance of the call by the candidate. And until such acceptance by him no civil contract for his permanent employment as regular pastor at the stipulated compensation can be formed or made obligatory upon the congregation. — *West v. First Presbyterian Church*, Minn., 42 N. W. Rep 922.

17. CONSTITUTIONAL LAW. — Section 11 of "An act to regulate the practice of medicine in the State of Illin-

ois," approved June 16, 1887, which provides that itinerant vendors of drugs and nostrums shall obtain a license under penalty of a fine to be recovered by the people in an action of debt, is not in conflict with Const. Ill. art. 4, § 13, which provides that "no act shall embrace more that one subject, and that shall be expressed in the title." — *People v. Blue Mountain Joe*, Ill., 21 N. E. Rep. 923.

18. CONTRACT — Corporation. — In an action on a contract to recover compensation for procuring a loan, the plea that plaintiff was the agent of a foreign corporation which had not complied with the law authorizing foreign corporations to do business in the State was not demurrable, and constituted a complete defense to the suit.—*Dudley v. Callier*, Ala., 6 South. Rep. 304.

19. COURT — Jurisdiction. — On appeal to a county court, A and B being the sureties on the appeal bond, the court quashed the bond, and a new one was given, with different sureties. Judment was rendered against the appellants, and also against A and B as sureties on appeal. They all appealed to the court of appeals, (the court of last resort,) one of the assignments of error being that the county court had no jurisdiction of the persons A and B. That court affirmed the judgment: *Held*, that A and B could not enjoin execution on the judgment on the ground that the county court had no jurisdiction over them. — *Sweatman v. Stratton*, Tex., 11 S. W. Rep. 1055.

20. CRIMINAL LAW — Privileged Communications. — Statements to his attorney by one who has admitted his connection with a crime, and testifies against another as an accomplice, are not privileged communications, but may be admitted, as other statements made out of court are admitted, to impeach the witness.—*People v. Gallagher*, Mich., 42 N. W. Rep. 1063.

21. CRIMINAL LAW — Murder. — On a trial for murder, where every circumstance leading up to the killing is detained in evidence, it is error to charge that, "where the fact of killing purposely by the use of a deadly weapon is proved, malice is to be presumed, unless it appears from all the evidence that the killing was without malice, or was justifiable or excusable," and that "the burden then falls upon the defendant to show either that such killing was justifiable or excusable, or that it was attended by such facts as would limit such killing to the crime of manslaughter. — *Trumble v. Territory*, Wy. Ter., 21 Pac. Rep. 1082.

22. CRIMINAL LAW—Murder.—It being in the discretion of the jury whether the death penalty shall be inflicted on conviction for murder, and defendant having been sentenced to death, the admission of the above evidence showing that defendant shortly after the shooting committed a rape upon the wife of deceased, was such error as calls for a reversal, as its tendency was to destroy any feeling of mercy which might otherwise have existed in the minds of the jury, and this notwithstanding the proof of murder was abundant. — *Farris v. People*, Ill., 21 N. E. Rep. 821.

23. CRIMINAL LAW— Forgery. — Where an instrument on which an indictment for forging is based is set out *in hæc verba* in the indictment, but is so illegible and uncertain that its meaning cannot be ascertained, the indictment is bad on demurrer if the extrinsic facts connected with the instrument are not averred so that the court can see its capacity to create a liability or effect a fraud.— *Fomby v. State*, Ala., 6 South. Rep. 271.

24. CRIMINAL LAW— Homicide. — The evidence tended to show that while deceased and defendant were together in a room, deceased attempted to draw his pistol to shoot defendant, but had difficulty in getting it from his pocket, and moved slowly towards the door, seeking constantly to get his pistol in position to shoot: *Held*, that notwithstanding such retreat, defendant was justified in shooting deceased while so engaged in the attempt to use his pistol, and the court erred in charging the jury, without the proper qualification, that it was murder or manslaughter, to pursue an adversary and kill him while in retreat. — *Luckenbill v. State*, Ark., 11 S. W. Rep. 963.

25. CRIMINAL LAW— Trial. — Code Ala. § 751, providing that criminal dockets shall be taken up, when the term of the court is for two weeks, on the second Monday of the term, means that criminal dockets shall then be taken up to the exclusion of civil business, but does not preclude the court from proceeding with the criminal docket before that time. — *Goley v. State*, Ala., 6 South. Rep. 287.

26. CRIMINAL LAW — Burglary. — On indictment for burglary it is proper to charge that, if defendant recently after the commission of the burglary was found in possession of a part of the goods stolen, this would cast on him the burden of explaining his possession. — *Cooper v. State*, Ala., 6 South. Rep. 303.

27. CRIMINAL LAW — Sentence. — Defendants pleaded guilty to a charge of burglary, and were sentenced each to five years in the State's prison, from and including the date of sentence. Later, on the same day, they attempted to break jail, and the following day they were brought into court, the original sentence set aside, and they were resentenced, one for nine and the other ten years: *Held*, that the first sentence went into effect the day it was pronounced, and that the second sentence was a nullity. — *People v. Meservey*, Mich., 42 N. W. Rep. 1133.

28. CRIMINAL LAW. — Defendant having been again tried and convicted, and confined, pending a writ of error, for a time longer than the period fixed by the verdict of the first jury, the supreme court will, on reversing the judgment, direct the trial court to enter judgment on the first verdict as of the date of its rendition, and thereupon discharge him. — *State v. Snyder*, Mo., 11 S. W. Rep. 1036.

29. CRIMINAL PRACTICE— Amendment. — An information for murder alleged the commission of the crime under a *videlicet* as on December 4, on which charge the examination was made before the magistrate. The proof, as in the preliminary examination, showed that the child alleged to have been murdered died December 7. After the jury was impaneled the court allowed the information to be amended by changing the date to the 7th, to agree with the proof to be offered: *Held*, that under How. St. Mich. §§ 9523, 9534, 9537, the amendment was properly allowed. — *People v. Hamilton*, Mich., 42 N. W. Rep. 1131.

30. DEED—Quitclaim.—A purchaser by quitclaim deed, and for a nominal consideration, cannot claim the protection of a *bona fide* purchaser. — *Lunpkins v. Adams*, Tex., 11 S. W. Rep. 1070.

31. DEEDS.—A paper reciting that it is an "indenture" between certain parties; and that in consideration "one dollar in hand paid" one party "by the presents, doth bargain, sell, etc., all her property, real and personal, to the other parties, H and K in trust for certain purposes; and that for the further sum of one dollar she does "hereby grant, bargain, etc., to H and K all the property of which she may die seized or possessed, less one-eighth of an acre each to be given to the persons named,—is a deed, and vests in H and K an immediate interest in the property. — *Kyle v. Liddell*, Ala., 6 South. Rep. 296.

32. DEVISE.— The title of a devisee under a will which has been admitted to probate in another State cannot be declared void, in a suit to quiet title, on the ground that the devise was procured by fraud. — *Winslow v. Donnelly*, Ind., 22 N. E. Rep. 12.

33. DIVORCE — Alimony. — Under Code Civil Cal. § 129, providing that, when a divorce is granted for an offense of the husband, "the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support during life, or for a shorter period, as the court may deem just," etc., alimony may be decreed in gross. —*Robinson v. Robinson*, Cal., 21 Pac. Rep. 1095.

34. DOMICILE. — Debts have their *situs* at the domicile of the creditor, and they do not lose that *situs* because reduced to judgment at the domicile of the debtor. — *Meyer v. Pleasant*, La., 6 South. Rep. 258.

35. DOMICILE— Infancy. — Mill. & V. Code Tenn. § 4390, concerning the adoption of children, provides that the effect of such adoption is to confer upon the person adopted all the privileges of a legitimate child to the applicant: *Held*, that where an adoptive parent removed, in good faith, to another State, taking the adopted minor child with him, and acquired a *bona fide* domicile in that State, the domicile of the child became the same.— *Woodward v. Woodward*, Tenn., 11 S. W. Rep. 892.

36. DOWER. — Where a petition of a widow for allotment of dower avers that her husband was "seized and possessed" of lands therein described, though such an averment is not strictly within any one of the provisions of Civil Code Ala. 1876, § 2332, which provides that the widow is dowable (1) of all the lands of which the husband was seized in fee during the marriage; (2) of all lands of which another was seized in fee to his use; (3) of all lands to which, at the time of his death, he had a perfect equity, having paid all the purchas money, evidence was admissible to show that the seizin was in fee. — *Sheppard v. Sheppard*, Ala., 6 South. Rep. 275.

37. EJECTMENT. — The equitable defense that a deed absolute was intended and understood by defendant to be only a mortgage, and that plaintiff purchased the premises with notice of his claim, cannot be made in an action of ejectment.—*Gates v. Sutherland*, Mich., 42 N. W. Rep. 1112.

38. ESTOPPEL IN PAIS. — Plaintiff stated to defendant that another owed him, but that, if defendant would furnish the debtor with supplies, plaintiff would not claim the debtor's crops. Defendant furnished the supplies, and was given a parol lien on the crops. Code Ala. 1886, § 1731, declares a mortgage of personal property illegal unless in writing. Plaintiff afterwards took a written mortgage on the crops: *Held*, that plaintiff was not estopped by his conversation with defendant to assert his claim to the crop. — *Weaver v. Bell*, Ala., 6 South. Rep. 298.

39. EVIDENCE—Res Gestæ.—Evidence of exclamations of pain, made by plaintiff shortly after she received the personal injuries complained of, was admissible as part of the *res gestæ*. — *Harris v. Detroit City Ry. Co.*, Mich., 42 N. W. Rep. 1111.

40. EVIDENCE — Sale. — In replevin for cattle of a certain brand, it appeared that defendant had conveyed by bill of sale all of the cattle of that brand to B, who, on the following day, reconveyed a portion to defendant. Plaintiff claimed under mesne conveyances from B, of all his interest in the herd, and showed these conveyances in evidence: *Held*, that parol evidence was admissible that B told his vendee at the time of the sale that defendant had reserved a portion of the cattle, though the bill of sale contained no such reservation.— *Hecht v. Johnson*, Wy. Ter., 21 Pac. Rep. 1080.

41. FRAUDULENT CONVEYANCES.—Where a conveyance of personalty is attacked by creditors as fraudulent, evidence of declarations by the grantor after the conveyance is not admissible to affect the grantee's title, in the absence of evidence that the grantor and grantee acted together, in pursuance of a common design. — *Bergen v. Producers' Marble Co.*, Tex., 11 S. W. Rep. 1027.

42. FRAUDULENT CONVEYANCES.— An insolvent debtor mortgaged land to a preferred creditor to secure payment of the debt. The mortgage was to run nine years. the debt which it secured being made payable in nine annual installments. The mortgagee knew of other debts of the mortgagor, who was left in possession of the mortgaged property: *Held*, that the mortgage was doubly fraudulent as to other creditors (1) in securing a valuable benefit to the preferred creditor; (2) in delaying and hindering all other creditors in the assertion of their claims. — *McDowell v. Steele*, Ala., 6 South. Rep. 288.

43. FRAUDULENT CONVEYANCES. — A transfer of property by an insolvent debtor to his creditor in payment of an antecedent debt will not be upheld if the debt be *bona fide*, its amount not materially less than the fair and reasonable value of the property, and payment of the debt is the sole consideration, and no use or benefit is secured or reserved to the debtor. — *Knowles v. Street*, Ala., 6 South. Rep. 273.

44. FRAUD—Sale. — Where a sale of land to which the vendor has no title is effected by his fraudulent misrepresentations, but it does not appear that the parties contemplated that improvements would be made on the land, the purchaser is entitled to recover the purchase money and interest, but not the cost of improvements made by him, nor exemplary damages, nor attorney's fees. — *Haddock v. Taylor*, Tex., 11 S. W. Rep. 1093.

45. FRAUDS— Statute of. — Where a person buys land by parol contract, and enters no possession after payment of the price, but makes no improvements on the land of any value, he can convey no interest in the land which will prevail against the legal title.— *Bradley v. Owsley*, Tex., 11 S. W. Rep. 1052.

46. GARNISHMENT.—Garnishment is attachment in the hands of a third person, and thereby is a species of seizure by notice. — *Beamer v. Winter*, Kan., 21 Pac. Rep. 1078.

47. GARNISHMENT. — Under Rev. St. Tex. art. 191, providing that "from and after service of such writ of garnishment it shall not be lawful for the garnishee to pay to the defendant any debt, or to deliver to him any effects," where a writ of garnishment and summons are issued but not served upon the garnishee, his subsequent appearance and answer give the court no jurisdiction of the fund. — *Insurance Co. v. Friedman*, Tex., 11 S. W. Rep. 1046.

48. GUARDIAN AND WARD.— The mere fact that a guardian took Confederate money in payment of notes taken by him for his ward, and that this money became worthless at the close of the war, does not overturn the presumption of correctness of a decree allowing the guardian a credit for the amount in his settlement. —*Bentley v. Dailey*, Ala., 6 South. Rep. 274,

49. HABEAS CORPUS.— A former conviction for unlawful cohabitation with a certain woman cannot be considered, on an application for *habeas corpus*, to be discharged from imprisonment on conviction of adultery with the same woman, where it was not pleaded as a defense.— *In re Maughan*, Utah, 21 Pac. Rep. 1088.

50. HIGHWAY. — Act Ark. March 18, 1887, providing for a civil action for obstructing a highway, is cumulative, and does not repeal Manif. Dig. § 1865, making it a misdemeanor to place any obstruction in a highway. — *St. Louis, etc. Ry. Co. v. State*, Ark., 11 S. W. Rep. 1035.

51. HOMESTEAD. — A tract of land, greater than is allowed by law for a homestead, was purchased by complainant of one who occupied it as a homestead. Afterwards it was sold under a chancery execution against complainant's grantor, and was bought by respondent The latter obtained a judgment in ejectment against complainant and her grantor, and also obtained judgment for rents: *Held*, that complainant had an equitable title in so much of the land as was properly the homestead of her grantor, and equity would appoint commissioners to set it apart by metes and bounds.— *Clark v. Allen*, Ala., 5 South. Rep. 272.

52 HUSBAND AND WIFE. — A husband sold his wife's land, she not being present, and incorrectly represented to the purchaser that one of the boundaries extended to a certain fence; but neither the deed which the wife executed apart from the husband and without knowledge of such representation, nor the note given to her for the purchase price, contained anything to indicate that such representation had been made: *Held*, that she had not ratified the husband's act, either by executing the deed or accepting the note.— *Etheridge v. Price*, Tex., 11 S. W. Rep. 1039.

53. INFANCY — Negligence. — An infant, who is an orphan, cannot be deprived of his right to damages for a personal injury which reduces his capacity to earn money, so far as such capacity is affected during his

minority, by the fact that another person has assumed a parental relation towards him, where he has not legally adopted him. — *Fort Worth St. R. Co. v. Witten*, Tex., 11 S. W. Rep. 1091.

54. INFANT'S CONTRACTS. — An infant is liable for reasonable attorney's fees for defending him in a criminal action. A note and mortgage given for the agreed price of such services are not void, but a recovery thereon may be reduced to the reasonable value of the services.—*Askey v. Williams*, Tex., 11 S. W. Rep. 1101.

55. INSURANCE—Mutual Companies.—Where the "particular business and objects" of a mutual benefit company are by its certificate of incorporation declared to be "to give financial aid and benefit to the widows, orphans, and heirs or devisees of deceased members," a certificate of membership by which the corporation agrees to pay the member the sum of one dollar for each member of his division upon his arriving at 70 years of age, or after he has been a member in good standing for 25 years, or upon his death to his wife, if living, if not to his children, etc., is *ultra vires* and void, so far as it undertakes to pay anything to the member. — *Rockhold v. Canton Masonic Mut. Ben. Soc.*, Ill., 21 N. E. Rep. 794.

56. INTOXICATING LIQUORS. — It is no defense to an indictment for selling liquor to a minor that defendant did not own the whisky, and received nothing for it, nor that it was measured and delivered to the minor at the request or command of the person to whom it belonged, and who received payment therefor. — *Cagle v. State*, Ala., 6 South. Rep. 300.

57. INTOXICATING LIQUORS. — It is no defense to an indictment for selling spirituous liquors without a license, and contrary to law, that defendant was a minor about 17 years of age, and was selling under instruction of, and as agent or servant of, another, without compensation, in the absence of proof that she was of such tender years as to be legally incapable of committing the crime, or was under duress.— *Cagle v. State*, Ala., 6 South. Rep. 300.

58. JUDGMENT — Certiorari. — In an action on a judgment taken before a justice by default, defendant cannot be allowed to show, under a plea of set-off, that before the original suit was begun he had paid plaintiff's claim in full.—*Peterson v. Ringelberg*, Mich., 42 N. W. Rep. 1080.

59. LANDLORD'S LIEN. — Where a tenant holds over after the term stipulated, the relation of landlord and tenant continues, and a lien for rent on tenant's goods remaining on the demised premises is not affected by an alleged sale to a third party. — *Abraham v. Nicrosi*, Ala., 6 South. Rep. 293.

60. LEASES —Lessees under a lease for a term of years made an assignment before the expiration of the term, and were adjudged bankrupts. The assignee in bankruptcy surrendered the premises to the lessor with the understanding that it should not affect the lessor's rights against the estate, but there was no agreement or understanding in regard to the liability of the lessees personally. The lessor then leased the premises to others: *Held*, that this did not amount to an eviction of the lessees, nor to a surrender of the remainder of the term.—*Stewart v. Sprague*, Mich., 42 N. W. Rep. 1088.

61. LIMITATION OF ACTIONS. — Under Rev. St. Tex. art. 1181, making the filing of a petition the commencement of an action, the statute of limitations ceases to run at the time of such filing, though more than two years elapsed before any citation is issued; it not being shown that the delay was caused by plaintiff.—*Tribby v. Wokee*, Tex., 11 S. W. Rep. 1089.

62. LIMITATION OF ACTIONS. — In computing the time by which an action is barred by Rev. St. Tex. art. 3203, which provides that certain actions "shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterwards," the day on which a cause of action accrues is not counted.—*Smith v. Dickey*, Tex., 11 S. W. Rep. 1049.

63. LIMITATION OF ACTIONS. — An allegation in a bill seeking to avoid the statute of limitations, that defendant was, when the cause of action accrued, and ever since has been, a non-resident of this State, and then, resided, and ever since has resided, and now resides, in Tennessee, is sufficient to bring the case within the exception provided for by Code Ala. § 2622, as to absence from the State. — *Stevenson v. Anderson*, Ala., 6 South. Rep. 285.

64. MASTER AND SERVANT. — Defendant had a contract with W, by which the latter unloaded coal from vessels on defendant's dock at a certain rate per ton, and hired the men necessary for the work, while defendant furnished the hoisting apparatus, by means of which buckets of coal weighing about 250 pounds were elevated from the vessel's hold. A chain was used as a part of the apparatus, and when new chains were needed they were supplied by defendant. The chain had broken several times: *Held*, that defendant was liable to an employee of W injured through the breaking of the chain while working in the hold, if defendant could have known by inspection that the chain was insufficient.—*Johnson v. Spear*, Mich., 42 N. W. Rep. 1092.

65. MASTER AND SERVANT. — In an action for wages, the evidence tended to show that plaintiff was employed by defendant to work in his grist-mill, and that the tolls received were used by plaintiff, but that the mill did but little work, and that defendant knew when he employed plaintiff that the earnings of the mill would be entirely insufficient to pay for plaintiff's services: *Held*, that an instruction was properly refused to the effect that plaintiff having received the entire proceeds of his labor, and defendant having derived no benefit therefrom, plaintiff could not recover. —*Bonner v. Runals*, Mich., 42 N. W. Rep. 1087.

66. MASTER AND SERVANT. — Evidence considered, and *held* to show that an employee assumed the risk of the dangers incident to the work; such work consisting of digging and removing earth from a nearly perpendicular bank of earth.—*Pederson v. City of Rushford*, Minn., 42 N. W. Rep. 1063.

67. MASTER AND SERVANT. — Plaintiff had worked in a machine-shop a year, and had seen a grindstone trimmed by others, and had been shown by the foreman how to trim it. The iron bar which he held against the stone caught in it, and was turned down, and his hand was crushed between the bar and the stone: *Held*, that as the danger must have been as apparent to him as to one of more experience, and he could have avoided the danger by letting go of the bar when it caught, he must be considered to have assumed the risk, and cannot recover. — *Melzer v. Peninsular Car Co.*, Mich., 42 N. W. Rep. 1078.

68. MASTER AND SERVANT— Negligence. — In an action by a brakeman for damages for personal injuries caused by coming in contact with a highway bridge across the railroad track while he was riding on the top of a freight car, Code Ala. 1886, § 1144, requiring railroad companies "to blow the whistle or ring the bell at short intervals at least one-fourth of a mile before reaching a public road crossing," had no bearing on the case, and it was error to consider it. — *Louisville, etc. R. Co. v. Hall*, Ala., 6 South. Rep. 277.

69. MORTGAGE—Parol Evidence. — A certificate, under seal, of payment of a mortgage and note accompanying it, and authorizing the register of deeds to discharge the mortgage on the record, may in an action on the note, be contradicted by parol. — *Thompson v. Layman*, Minn., 42 N. W. Rep. 1061.

70. MORTGAGES — Marshaling Assets. — C purchased land, executing a mortgage for the unpaid purchase money, and subdivided it into lots and blocks. A large number of the lots were sold, the trustee executing releases. The money to make the cash payment had been furnished partly by H, C executing a writing, reciting the payment, and that as the property was sold H was "to have one-half of the profits." H by paying installments, recognized himself as bound as a joint purchaser, and assigned all his "right, title, and inter-

est in the contract of purchase" to B, to secure an existing indebtedness, which interest B assigned to R, taking in payment therefor C's note secured by a mortgage on a portion of the land, in which C warranted his title subject to the prior mortgage: *Held*, that H was by his contract with C but a partner in the lands, and could assert no equities adverse to the prior mortgage, and that B and those claiming under him, took only H's interest subject to the same limitations. — *Boone v. Clark*, Ill., 21 N. E. Rep. 850.

71. MUNICIPAL CORPORATION. — An approach to a bridge was of dirt, with a stone wall on each side. Stringers were laid on the dirt, and a plank walk laid on the stringers for foot passengers. Plaintiff was injured by a defect in this walk: *Held*, that it was a sidewalk, and no part of the bridge proper, or of the approach to the bridge; and as at the time of the accident municipalities in Michigan were not liable for injuries caused by defective sidewalks, plaintiff could not recover.— *Saunders v. Township*, Mich., 42 N. W. Rep. 1088.

72. MUTUAL BENEFIT INSURANCE. — Comp. Laws Mich. 1871, ch. 94, under which complainant, a mutual benefit association, was incorporated, permitted corporations to be formed "for the purpose of securing to the families or heirs of any member, upon his death, a certain sum of money." The articles of complainant, as originally filed, so defined its object: *Held*, that the assignment of a policy by a member of complainant to a brother of the assignor's wife, having no insurable interest in the life of the assignor was void. — *Lyon v. Rolfe*, Mich., 42 N. W. Rep. 1094.

73. NEGLIGENCE.—A village is liable for injuries caused to a person by falling off from a sidewalk maintained at an unsafe height without guards, though the accident was directly caused by the negligent act of a third person in pushing the person off the sidewalk.—*Village v. Cook*, Ill., 22 N. E. Rep. 14.

74. NEGLIGENCE. — The occupant of a building in which is an opening to an elevator shaft facing on a public street, but separated from the sidewalk by a lintel three inches high and eighteen inches wide, is not responsible for injuries received by a passer-by who is accidently pushed into the opening by third persons.— *McIntire v. Roberts*, Mass., 22 N. E. Rep. 13.

75. NEGLIGENCE. — Defendant was erecting a house upon his wife's lot for her, he having the entire control and direction of the work. One of the men whom he engaged to haul brick took up the sidewalk in front of the lot for the purpose of driving in from the street. This was done without defendant's consent, but he permitted the men to continue to use it until the wagons cut ruts into the ground, into one of which plaintiff fell, receiving the injuries sued for: *Held*, that defendant's act in permitting the walk to remain torn up was an act of misfeasance, for which he was liable to plaintiff, and not merely an act of non-feasance, for which he would be liable only to his principal. — *Ellis v. McNaughton*, Mich., 42 N. W. Rep. 1113.

76. NEGOTIABLE INSTRUMENT— Consideration.—A plea of failure of consideration sworn to, throws the *onus* on plaintiff, and that is not met without other proof than the note itself. — *Smith v. LeVesque*, Fla., 6 South. Rep. 263.

77. NEGOTIABLE INSTRUMENTS.— A judgment rendered on a negotiable promissory note on the third day of grace is premature, and erroneous, as the payee has all of that day in which to pay the note. — *Hamilton Gin & Mill Co. v. Sinker*, Tex., 11 S. W. Rep. 1056.

78. PARENT AND CHILD. — Under the constitution and laws of this State the father and mother are the natural guardians of the person of their minor children, and each parent equally so with the other. — *State v. Angel*, Kan., 21 Pac. Rep. 1075.

79. PARTNERSHIP. — Where the terms of a written agreement of partnership are somewhat vague and ambiguous, the practical construction of the contract of the parties themselves is entitled to great, if not controlling, influence.—*Rathbun v. McConnell*, Neb., 42 N. W. Rep. 1042.

80. PARTNERSHIP—Injunction. — One of the complainants, who were partners, gave his individual notes to a firm debtor, for payments to him individually made by the latter, who claimed that he owed the firm nothing, under an arrangement whereby the notes were to be held by the debtor against the individual partner in case, on final settlement, nothing was found due by him to the firm: *Held*, that the firm could not enjoin a third person, who held the notes, from bringing an action thereon, as the firm's remedy was at law, by way of set-off, and there was no mutality of contract between the parties to such suit. — *Dewey v. Billings*, Mich., 42 N. W. Rep. 1077.

81. PARTNERSHIP.— A partnership was accustomed to raise funds on notes of one partner indorsed by the other. The proceeds went to the firm, and were entered directly in the cash-book, and not as in account with any person. The notes and renewals were entered in the firm books, and the interest on the renewals was paid by the firm. The notes were made in the individual form, with the full knowledge and consent of both partners: *Held*, that the making and indorsing were partnership acts, and, the firm being dissolved by death of one of the partners, and the other being insolvent, the holders could prove as partnership creditors. — *Colwell v. Weybosset Nat. Bank*, R. I., 17 Atl. Rep. 913.

82. PARTNERSHIP.—Defendant's firm was engaged in a general mercantile and limited exchange business, conducted exclusively by S. Plaintiff, a county, issued bonds for the construction of a court-house, and the commissioners' court authorized the firm to negotiate them for cash. They were sold in the firm name, the proceeds deposited in a bank, and drawn out on checks made in the firm name. None of the partners except S had anything to do with the transaction, or had any actual knowledge of it: *Held*, that if the transaction was not within the scope of the firm business, the partners who did not participate in it or ratify it were not liable, though plaintiff believed that it was within the scope of the firm business. — *Nolan County v. Simpson*, Tex., 11 S W. Rep. 1098.

83. PRINCIPAL AND AGENT— Negotiable Instruments.— An agent having possession of negotiable securities assigned to him in blank, with a power of attnorey to sell them, pledged them to a bank for his own debt without the knowledge of his principal. The bank sold them without the indorsement of the principal: *Held*, that indorsement of the securities by the principal after the sale and without a knowledge of the pledge of the agent, was neither a ratification of the act of the agent, nor a confirmation of the sale made by the bank. — *Taliaferro v. Baltimore First Nat. Bank*, Md., 17 Atl. Rep. 1036.

84. PRINCIPAL AND AGENT.—After the relation of principal and agent has terminated the agent has no authority to certify to the correctness of an account stated by the principal's creditor for goods sold to the agent during his employment.— *Gunter v. Stuart*, Ala., 6 South. Rep. 266.

85. PROBATE PRACTICE. — Rev. St. Tex. arts. 1921, 1922, provide that any administrator shall, on complaint of any person interested in the estate, be cited to show cause why he shall not be required to return an additional inventory of the estate, and if on the hearing there appears to be property of the estate not included in the inventory, the court shall require the additional inventory to be filed, and the property appraised: *Held*, that it is not proper to include the proceeding to have the additional property inventoried in a proceeding to require the administrator to make an exhibit of the condition of the estate. — *Chefflet v. Willis*, Tex., 11 S. W. Rep. 1105.

86. RAILROAD COMPANY. — Even in the absence of statutory and municipal regulation, a railroad company has no right to run its freight trains through a popu-

lous city, even in places where the general public has no right to be, at any rate of speed consistent with the safety of its employees and the property on the train, but such rate of speed must be regulated by a due regard for the safety of the public.—*Chicago, etc. Ry. Co. v. Dunlevy*, Ill., 22 N. E. Rep. 15.

87. RAILROAD COMPANIES.—A railroad company whose charter authorizes it to construct its road across highways on condition that the free use of the latter shall not be impaired, and that any highway so crossed shall be restored to its former good condition, is not only not relieved by the terms of the charter from its common-law liability to maintain, and, when necessary, rebuild, a bridge constructed by it over its tracks as a highway crossing, but is thereby required to do so, and this duty is also imposed on the successor of its franchises. — *Chesapeake, etc. R. Co. v. Dyer County*, Tenn., 11 S. W. Rep. 943.

88. RAILROAD COMPANY. — Rev. S,. Tex. art. 2899, provides that a railroad company shall not be liable for the death of a person killed on its tracks unless caused by the carelessness of the company or the gross negligence or unfitness of its servants: *Held*, that evidence of a single act of carelessness on the part of the driver of a car at a time other than when the accident happened is not sufficient to establish the unfitness of the driver, though uncontradicted. — *Dallas City R. Co. v. Beeman*, Tex., 11 S. W. Rep. 1102.

89. RAILROAD COMPANIES. — Where plaintiff's horses are injured by being struck by defendant's train, plaintiff, if entitled to recover at all, can recover reasonable compensation for attention and expenses in an attempt to cure them, if rendered in good faith. — *Gulf, etc. Ry. Co. Keith*, Tex., 11 S. W. Rep. 1117.

90. TAXATION. — Acts Mich. 1869, No. 169, § 124, providing for the resale of lands bought by the State at a tax-sale remaining unsold for five years, and for charging back to the proper county any deficiency in the amount bid at such resale below the amount bid by the State at the first sale, is invalid, in so far as it requires losses sustained on previous purchases to be charged back to the county, and such losses are not a proper charge against the county.— *Auditor General v. Board*, Mich., 42 N. W. Rep. 1101.

91. TAXATION.— Under Rev. St. Ind. 1881, § 6339, which imposes a penalty, recoverable by the State on relation of the prosecuting attorney, for giving a false or fraudulent list of taxable personal property, a judgment cannot be recovered where the complaint does not allege, and the jury does not find, that the defendant owned property which it is alleged he failed to list. — *Davis v. State*, Ind., 22 N. E. Rep. 9.

92. TAXATION — License. — A license is a tax. It is a license tax and not a property tax. A license could not be held to be a property tax without making it unconstitutional, as being, together with the *ad valorem* tax, permitted by the constitution in excess of its limitation. —*Parish of Morehouse v. Brigham*, La., 6 South. Rep. 257.

93. TAX-TITLES.—Act Miss. 1860, provided that all sales of land thereafter made for taxes shall be valid to all intents and purposes, and should not be impeached or questioned in any manner, or for any cause except mistake or in assessment or sale, or on proof that the tax for which the land sold had been paid prior to sale; constitutes an irrevocable and irrepealable stipulation with the purchaser, running with the land as perpetual security of title, which was in no way affected by subsequent amendatory acts; but as to lands bought by the State the power existed to repeal the act, as no contract was impaired thereby.—*Sigwan v. Lundy*, Miss., 6 South. Rep. 2.

94. TENANCY IN COMMON.— Under a contract by which one party furnishes the land and teams and the other the labor, and the crop is to be equally divided between them, and the parties are tenants in common of the crop, and are limited to the rights of such relation until the laborer resorts to the remedy by attachment provided by Code Ala. § 3065, for his protection against the unfair dealings of his co-tenant. — *Adams v. State*, Ala., 6 South. Rep. 270.

95. TRESPASS— Boundaries. — The legislature has authority, under the police power of the State, to require every man to inclose his land by a fence built in a prescribed manner, and it may refuse him a remedy for a trespass by cattle entering upon it in consequence of his neglect to comply with such requirements, but it cannot authorize one man to pasture his stock upon the land of another, whether fenced or not; it may withhold the remedy, but it cannot grant the right. — *Bilcu v. Paisley*, Oreg., 21 Pac. Rep. 984.

96. TRIAL—Jury.—In his examination of the jurors on their *voir dire* counsel for plaintiffs stated the full particulars of plaintiffs' claim, and also his version of the defense that would be set up, and was permitted, under pretense of ascertaining whether or not the jurors knew anything about the case, to really open his case to them: *Held*, that the effect was to prejudice and bias the minds of the jurors before they were sworn, and the failure of the court to keep the counsel within bounds was prejudicial error. — *Hudson v. Roos*, Mich., 42 N. W. Rep. 1099.

97. TRIAL—Instructions.—Where part of the testimony offered upon trial was legal, and the objection was to the whole in a lump, the court may overrule the entire objection without separating the legal part from the illegal.—*Coleman v. State*, Ala., 6 South. Rep. 290.

98. TRUSTEE.—A trustee who deposits trust funds in a bank, and takes a certificate of deposit therefor payable to himself, is responsible for loss caused by the bank's failure, though the instrument creating the trust directed that the money should be deposited in that bank.—*Corya v. Corya*, Ind., 21 N. E. Rep. 8.

99. WATERS AND WATER-COURSES. — A stream which had been a natural water course was obstructed by a flood, and from that time water flowed to plaintiff's lands, situated on the stream, only in time of freshets. Plaintiff purchased the right to turn other streams into the old channel for purposes of irrigation. Defendant corporation had obtained from plaintiff's grantors the right to turn water into the stream, with the privilege of turning it out again, and of clearing the obstruction from the stream: *Held*, that this being a natural water-course, defendants were not entitled to take out more water than they turned in, and would be restrained from building a dam across the stream, whereby all the water would be diverted, and none would flow by plaintiff's land. — *Paige v. Rocky Ford Canal Co.*, Cal., 21 Pac. Rep. 1102.

100. WATERS AND WATER-COURSES. — A charter authorizing a canal corporation to acquire the privilege of using the water of a designated stream for purposes of irrigation does not, *ipso facto*, confer any rights to the use of the water. Such rights must still be acquired, by purchase or condemnation, from the riparian proprietors. — *Mud Creek Irr. Co. v. Vivian*, Tex., 11 S. W. Rep. 1078.

101. WILL. — A testator devised land to his daughter for life, provided she should survive him, remainder to her surviving children in fee. A subsequent clause in the will devised the same land to testator's wife for life, remainder to testator's heirs in fee. Both wife and daughter survived the testator, and the latter afterwards died leaving a son: *Held*, that said son, upon testator's death, took a vested remainder in fee.—*Bruce v. Bissell*, Ind., 22 N. E. Rep. 4.

102. WILL — Jury. — The right given by legislation to have a jury trial in a contested will case in the circuit court, prior to the adoption of the constitution of 1868, was not intended to be preserved by that constitution on a similar trial in the county court.—*Lavey Doig*, Fla., 6 South. Rep. 259.

103. WITNESS.— Under Code Ala., § 2765, removing all objection as to the competency of witnesses predicated on interest, excepting as to transactions with a decedent, a grantee in a deed can testify as to the handwriting of an absent attesting witness. — *Calera Land Co. v. Brickerhoff*, Ala., 6 South. Rep. 295.